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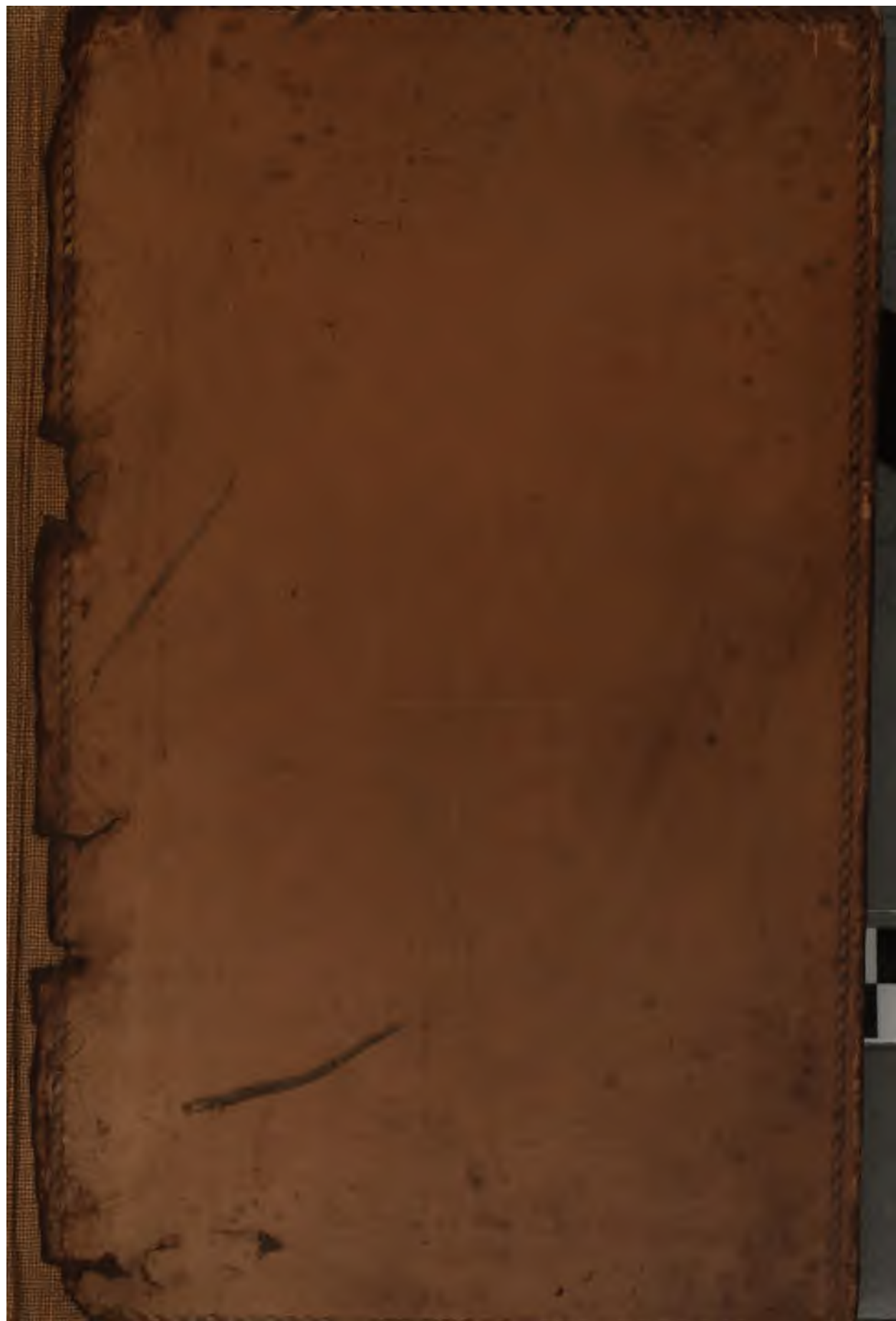
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**REPORTS OF CASES**  
**ARGUED AND DETERMINED IN THE**  
**HIGH COURT OF CHANCERY,**  
**DURING THE TIME OF**  
**LORD CHANCELLOR THURLOW, &c.**

**VOL. IV.**

# STUDY TO STUDY

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★  
**REPORTS OF CASES**  
**ARGUED AND DETERMINED IN THE**  
**HIGH COURT OF CHANCERY,**

**DURING THE TIME OF**  
**LORD CHANCELLOR THURLOW,**  
**AND OF**  
**THE SEVERAL LORDS COMMISSIONERS OF THE GREAT SEAL,**  
**AND**  
**LORD CHANCELLOR LOUGHBOROUGH,**

**From 1778 to 1794.**

*By WILLIAM BROWN, ESQ.*

**OF THE INNER TEMPLE, BARRISTER AT LAW,**

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**FIFTH EDITION,**

**WITH IMPORTANT CORRECTIONS AND ADDITIONS,**  
**FROM THE REGISTRAR'S BOOKS;**

**From the Author's MS. Notes in his own Copy, intended for a further Edition; from various MS. Notes of the highest authority, by eminent contemporary and dignified Members of the Profession.**

**TOGETHER WITH**  
**OBSERVATIONS FROM THE SUBSEQUENT REPORTS ON THE CASES**  
**REPORTED BY MR. BROWN,**  
**AND DECISIONS ON THE POINTS OF LAW TO THE PRESENT TIME,**

*By ROBERT BELT, ESQ.*

**OF THE INNER TEMPLE, BARRISTER AT LAW.**

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**IN FOUR VOLUMES.**

**VOL. IV.**

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**AND R. MILLIKEN, DUBLIN.**

**1820.**



## PREFACE

TO

MR. BROWN'S FOURTH VOLUME.

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**I**T seems necessary to inform the Profession, that the last part of the Fourth Volume, which concludes the Work, was printed in the life-time of the late Mr. *Brown*, down to the case of *Collis v. Swayne*, p. 480 : the remainder, (except some trivial omissions, a part of the INDEX OF CONTENTS, and the TABLE OF CASES,) was left complete for publication.

A professional friend of the deceased, anxious to pay this last tribute of respect to departed merit, has undertaken to supply those omissions and superintend the correction of the press. It is hoped, that this posthumous part will meet with the like favourable reception, as the former ones, and that such an interference will not prejudice the credit of a work, which although it may partake of that frailty so necessarily incident to human productions, must be esteemed, as a valuable collection of many important decisions, and remain a memorial of the meritorious industry of the very learned and truly respectable reporter.

*Middle Temple,*  
*July, 1794.*



A

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# CASES

ARGUED AND DETERMINED

IN

## THE COURT OF CHANCERY.

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TRINITY TERM,

32 Geo. 3. 1792.

Sir JAMES EYRE, *Knt.*, Sir WILLIAM HENRY ASHHURST, *Knt.*, Sir JOHN WILSON, *Knt.*, *Lords Commissioners.* Sir RICHARD PEPPER ARDEN, *Knt.*, *Master of the Rolls.* Sir ARCHIBALD MACDONALD, *Knt.*, *Attorney General.* Sir JOHN SCOTT, *Knt.*, *Solicitor General.*

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PARKER *against* PROUT.

(Reg. Lib. 1791. B. fol. 327. b.)

Lords Com-  
missioners  
*Ashhurst,*  
*Wilson.*

THE plaintiff having prevailed in some of the exceptions to the Master's report, a question arose, whether he should take out the deposit, or it should be divided.

Practice.

The Register said, that where the exceptant prevailed in any of the exceptions, he was entitled to the deposit.

[A party hav-  
ing prevailed in  
some excep-  
tions to the  
Master's report,  
and failed in  
others, the  
Court in this

Ordered accordingly (2), by two Lords Commissioners, in the absence of Lord Commissioner Eyre.

instance ordered the deposit to be returned.] [The Court has, however, of late years ordered the deposit to be divided. (1)]

(1) The Profession will see, from the Editor's notes on *Cookson v. Ellison*, *antea*, 2 vol. 252. note, that this was the course adopted there, (A. D. 1787,) where part of a single exception had been allowed, and the remainder over-ruled. For the more frequent course, in modern times, of dividing the deposit, see *Dawson v. Busk*, 2 Madd. Rep. 184. and the cases there collected.

(2) Deposit ordered to be returned. R. L.

1792.

{ \*2 }

Lords Commissioners  
*Eyre, Ashhurst,*  
and *Wilson.*

[S. C. 1 Ves.  
jun. 486.]

A codicil duly attested to pass real estate, annexed by testator to his will of lands, is a republication of the will, and shall pass after-purchased lands, though not mentioned. (1)

Where there is a mortgage term outstanding, it will be a bar to a recovery in ejectment at law, even between heir and devisee, claiming subject to the charge: the only remedy therefore in such a case is in a court of equity.

[\*] BARNES *against* CROW.

(No Entry.)

**WILLIAM BALCOMBE** being seised and possessed of real and personal estate, made his will, bearing date 29th *November*, 1784, duly attested to pass real estate, and thereby gave and devised all his messuages, &c., and all other his real estate, situate at *Feversham*, in the county of *Kent*, or elsewhere, to the plaintiffs in trust to sell, and dispose of the money arising therefrom, in the manner thereby directed. After making the said will, the testator made a codicil thereto, bearing date 5th *November*, 1785, not duly attested to pass real estate, and by which he made some provisions arising from the marriage of one of his daughters. After the making and publication of his will and such first codicil, he contracted with *Richard Horton*, for the purchase of an equity of redemption of premises in *Feversham*, then in mortgage to *Mary Hulbard*, for a term of five hundred years, and *Richard Horton*, by indentures of 2d and 3d *January*, 1786, conveyed to testator and his heirs, the premises, subject to the mortgage debt, and *Mary Hulbard* dying before the mortgage money was discharged, the executors by indentures of 4th *September*, 1786, in consideration of the payment of the mortgage money and interest due, conveyed (by the direction of the testator) the term of five hundred years to *Thomas Roper*, and the testator covenanted to pay the mortgage money, and entered into a bond to *Roper* for that purpose. After this transaction the testator made another codicil to his will, dated 27th *October*, 1788, whereby he made some alterations in the state of his affairs, and disposed of a leasehold estate, but which did not mention the lands purchased since the date of the will, which concluded thus: "In witness whereof I the said testator *William Balcombe* have to this my writing contained in this, and part of the preceding sheet of paper, which I declare to be a codicil to my said last will and testament, and which is to be accepted, and taken as part thereof, set my hand, &c., and the execution thereof was attested by three witnesses.

{ \*3 }

The first codicil was begun and partly written upon the last sheet of the testator's will, and was a continuation from [\*] the foot of the said will, and the second codicil was begun, and partly written upon the last sheet of the first codicil, and was a continuation from the foot of the said first codicil, and the testator's will and codicils were annexed to each other, by, or at the request of the testator.

The defendants who were heirs at law and in gavel-kind of the testator, having got into possession of the lands purchased after the will, the devisees in trust filed the present bill, submitting that the latter codicil was a republication of the testator's will, and that the after-purchased lands passed thereby, and praying a declaration to that purpose, and that the defendant might be decreed to deliver to the plaintiffs possession thereof.

Mr. *Solicitor General* and Mr. *Hall* for the plaintiffs.

There are two questions,

1st. Whether the after-purchased lands passed by the codicil, operating as a republication of the will.

2d. Whether, supposing they did not pass, the personal estate of the

(1) See also *Pigott v. Waller*, 7 Ves. 92. et seq., *Hulme v. Heygate*, 1 Merivale, 285., and *Rowlley v. Fyton*, 2 Merivale, 128., with the several cases there cited and commented on. It appears settled, from those authorities, that such a codicil will always operate as a republication unless an intention to the contrary be manifest.

testator

testator was not liable to discharge the incumbrances in favour of the heir at law.

As to the second question, they said it was not necessary to give the Court much trouble. Where a person purchases an estate, subject to a mortgage, it is not his debt, and his personal estate shall not exonerate the mortgaged lands; for this position were cited *Shafto v. Shafto*, (Mr. Cox's note on 2 P. Wms. 664). *D. of Ancaster v. Mayer*, (*ante*, vol. i. p. 454.) *Tweddel v. Tweddel*, (*ante*, vol. ii. p. 101. 152.) *Earl of Tankerville v. Fawcett*, (*ibid.* 57.)

As to the first point, a question can hardly be raised that the codicil in this case is a republication of the will, so as to affect the after-purchased lands. The words of the will are general words, they constitute a gift of all his lands in the county of *Kent* and elsewhere, so that had he been seised of these lands, at the time of making the will, the words were sufficient to pass them. Then he actually annexes the codicil [\*] to the will. With respect to the effect of the actual annexation of a codicil to a will, it was settled in the case of *Downing College*, 3d July, 1769, (*Attorney General v. Lady Downing*, Amb. 571.) that the annexation of a codicil, even relative to personal estate only, would operate as a republication of a will of lands. 1 Roll. Abr. 618., cited there, mentions annexation as one way by which a codicil republishes a will. So *Dyer*, 143. a. The same doctrine was held in two cases cited in *Attorney General v. Downing* (*Lytton v. Lady Falkland*, and *Lord Lansdown's case*). The same point is held, 2 Eq. Abr. 775. In *Acherly v. Vernon* in the same book, 565., Comyn's Rep. 381., and 3 Bro. Parl. Cas. 107., the codicil was not annexed, but there was an express reference to the will, and it was held to be a republication: the words there were, "I direct this codicil to be taken as part of my will." The case of *Jackson v. Hurlock* (Amb. 487.) was relied upon in *Attorney General v. Downing*. In *Carte v. Carte*, 3 Atk. 174. *Potter v. Potter*; 1 Vesey, 437. *Gibson v. Lord Montfort*, 1 Vesey, 485., the execution of a codicil will amount to a republication. In *Coppin v. Fernyhough*, (*ante*, vol. ii. p. 291.) Lord Thurlow held it to be a republication as speaking again of the will. Here the codicil was annexed previous to the publication of it.

Mr. Selwyn and Mr. Abbot, for the defendants the heirs at law.

The estates in question are estates in *Kent*, subject to the custom of gavel-kind. The defendants are customary heirs, and are in by descent. It is contended, on the other side, that the second codicil amounts to a republication of the will, we contend that it is not sufficient to republish it. The first codicil ratifies and confirms the will; there are no such words in the second codicil. But they contend that though there is no express republication, the circumstances shew it to be intended to operate as such, and they argue this from the annexation and attestation of the second codicil. The principle is, the intention to republish, *Dyer*, 143. margin. The earliest cases of republication are, by parol declarations of the intent to republish: the next by written declaration, which is now the only mode by which a will can be republished. 1 Roll. Abr. 618. *Montague v. Jefferies*, the mere appointment of new executors is [\*] not sufficient as to lands, *Copley v. Copley*, 1 Wms. 147. The case from a manuscript note appears to be thus: Sir *Godfrey Copley*, after having made his will, purchased lands, and afterwards made a codicil, and appointed it to be part of his will. Sir *Joseph Jekyll* said, these word were useless, for it was only what the law made it. With respect to annexation, it is true, that, in the early cases, that was supposed to be sufficient to shew that it was intended as a republication; yet, by subsequent cases, the mere circumstance of annexation will not amount to a republication, *Sympton v. Hornsby*, Prec. Ch.

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[\*5]



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[ \*6 ]

439., 2 Vern. 722. S. C. In *Cholmondeley v. Cholmondeley*, cited 1 Vesey, 489., the codicil did not pass the after-purchased lands. In *Potter v. Potter*, 1 Vesey, 437., Sir John Strange thought the republication depended on the subject matter, not the annexation. In *Gibson v. Lord Montfort*, 1 Vesey, 485., Lord Hardwicke thought it did not turn on the annexation, because, in fact, that circumstance amounted to no more than the inference of law. Then it amounts to mere reference; but there is no case where mere reference is sufficient. The case of *Acherley v. Vernon*, in the House of Lords, was in strong and express words. The only other mode of evidence by which the intent to republish is to be proved, is by the attestation, and the only clear rule on that subject is, that a codicil of personalty (not attested according to the statute to pass lands) will amount to a republication of a will of personalty. Lord Thurlow, in the case of *Coppin v. Fernyhough*, said, that was sufficient for him to decide upon. As to the other proposition that a codicil executed according to the statute shall amount to a new publication of a will of land, there is no case to be found to that purpose. *Gibson v. Lord Montfort* was decided on different grounds. Lord Hardwicke speaking of the doctrine, there says, "that will make every codicil executed according to the statute of frauds, do, though it relates only to personal estate; for a codicil is undoubtedly as a further part of the last will, "whether it is said so or not." And it appears by the report of the same case, in Amb. 93., (by the name of *Gibson v. Rogers*), that there was no determination on that point. The reason of the rule (supposing it to exist) is this, that the Court sees the act of attestation according to the statute, of a codicil of personalty, which shews that there was an intention to act upon land, which can only be by operating as a republication. But here it is [\*] a different case from that of a codicil merely acting upon a personal estate; because, in that case, there is no other method of accounting for the attestation by three witnesses, but the intention to republish. Here, the testator acts, by the codicil, on an estate which he took to be real, though it turns out to be personal: we must argue upon the testator's apprehension of the matter, and that was that intending to act upon an estate which he imagined to be real, he attests the codicil in the only way that could pass it. Then, they ask, that, having two estates the Court should refer the codicil to an act which the testator does not say should be attested by it. If he meant to pass these lands, it is extraordinary he did not mention them. Then, if it is doubtful what the intention of the testator was, the Court will not make a declaration to republish the will, and thereby disinherit the heir who never can be disinherited without implication plain.

With respect to the other point in this case; notwithstanding the authorities cited on the other side, the heir has a right to have the estate exonerated. It is different from those cases, because the testator here purchased the lands with the mortgage upon them, and entered into a covenant to pay the mortgage, and gave his own bond for the money, by which he made his executors liable to the payment of it. It is like the case of *Parsons v. Freeman*, Amb. 115.

Mr. Miford and Mr. Alexander (for defendants in the same interest with the plaintiffs) argued in support of the codicil operating as a republication. It is necessary to make a distinction between the cases on the subject, as they are before or after the statute of frauds; that statute having made it necessary for a republication to be attested by three witnesses: still there is a great analogy between those cases, all of them turning on this principle, that if there is a clear intention of the testator to republish the will, the codicil shall amount to such republication. It is argued that it must have sufficient expressions for the purpose. If the codicil contained the words, "ratify and confirm," there could be no

no

no doubt, in a case where the codicil was duly attested to pass land. If the will had been revoked by act duly attested, such a codicil would revoke the revocation, and set up the will again. Another effect [\*] of such a codicil would be to enlarge the words, and to make them pass after-acquired property; enlarging the operation, though not the sense of the words of the will, and bringing the date of the will down to that of the codicil. *Jackson v. Hurlock*, is a case in point to decide that, and the cases cited prove the position. Lord *Hardwicke*, in *Gibson v. Lord Montfort*, considered their effect as being that the codicil duly attested would pass after-purchased lands. The *Attorney General v. Downing* is very shortly stated; the words of the codicil do not appear. But in speaking of *Hutton v. Simpson*, 2 Vern. 722., where it is said, "that annexing a codicil to a will, if it relates only to personal estate, will not operate as a republication," Lord *Camden* says, "I am of opinion that either the report is mistaken, or that it is not law." In the case of *Carleton v. Griffin*, 1 Burr. 549. where the will was upon loose sheets (2), the publication of the last sheet was held a sufficient publication. Nothing can be so strong as the internal evidence in the present case. Here the only difference from *Carleton v. Griffin* is, that the papers are not distinct. It is clear, in the present case, the testator had his real estate in contemplation when he did the act. Lord *Camden* and Lord *Northington*, were both of opinion that words directing the codicil to be taken as part of the will amounted to a republication.

With respect to the other point, this is expressly within the cases cited before. The party giving his own bond for the charge is not sufficient to entitle the heir to have the estate exonerated. *Perkins v. Bayntun* (in Mr. *Cox's* note on 2 P. Wms. 664.) is a stronger case than the present.

The cause stood over to the next day of causes, when, Lord Commissioner *Eyre* pronounced the judgment of the Court to this effect.

This cause stood over, in order that the Court might look into the cases of *Acherly v. Vernon*, and the *Attorney General v. Downing*.

The question might be of great difficulty, if it was not so determined, that the Court is not at liberty to review [\*] it: because the two cases seem to be directly opposite. But it appears that *Acherly v. Vernon* is determined; and it is a case of such authority that every thing must give way to it, and must be considered as determined by it. It is a case of great weight, because it was first determined by Lord *Macclesfield*, and affirmed by the House of Lords, after questions put to the judges. It was there held that the codicil "ratifying and confirming the will," amounted to a republication, and became incorporated with it. It is matter of deduction from thence, that the publication of such a codicil in the presence of three witnesses, is a republication of the will.

There are four cases stated, in the report of that case, as having been cited; two of which seem of importance. In the first (*Lytton v. Lady Falkland*) the words were, "I make this codicil, which I will shall be added to, and be part of the will I have formerly made." Here was a manifest reference to the will, and a declaration that the codicil was meant to confirm it, and all that annexation relied upon in the *Attorney General v. Downing*. Lord *Cowper*, assisted by Sir *John Trevor*, Master of the

(2) It was not on loose sheets, but the whole was upon one and the same sheet. See the report. The testator, there, first wrote a will which was unattested, he afterwards wrote a codicil upon the same sheet which he subscribed in the presence of three witnesses, and taking up the sheet of paper, declared it to be his will in the presence of three witnesses, and then requested them to attest it, which they did. This was held to be a good publication of the whole contents of the sheet.

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Rolls, Lord Chief Justice *Trevor*, and Mr. Justice *Tracy* decreed it was no republication, "because since the statute 29 *Car. 2.* there can be no "devise of lands by an implied republication; for the paper in which "a devise of lands is contained, ought to be re-executed in the presence "of three witnesses." This was on the 16th *June*, 1708.

In the other case *Penphrase v. Lord Lansdown*, 11 *Ann*, upon the Earl of *Bath's* will; the will was made 11th *Oct.* 1684, and only executed: but on the 15th *August*, 1701, the testator made a codicil, and sending for seven persons, published it in these words: "This is my "will, and I publish this codicil as part thereof." Here was a strong republication of the will; but it was held by *Parker C. J.* and the Court of King's Bench to be no republication, for since the statute 29 *Car. 2.* there shall be no republication by implication, but the will must be re-executed, otherwise a devise of lands shall not be good. But, at the importunity of the defendant, a special verdict was found.

[\*9]

[\*] Here is a rule of construction upon the statute of frauds, clearly expressed and positively laid down, by the first men of their day, and that early after the passing of the statute, that there cannot be an implied republication; nothing short of a re-execution of the will shall be sufficient. In *Acherly v. Vernon* it is clear, that Lord *Macclesfield* did not adhere to his own rule in *Penphrase v. Lord Lansdown*, because the will was there (in *Acherly v. Vernon*) held to be republished without re-execution, and consequently must have been republished, notwithstanding the statute of frauds, by implication.

If the rule first laid down by *Cowper* and Lord *Macclesfield* is not sound, and the will may be republished by implication, I do not wonder that Lord *Hardwicke* in *Amb. 93.* (*Gibson v. Rogers*) should express doubts on the special grounds upon which it was argued before him, that a codicil executed before three witnesses might amount to a republication, and inclined to agree that every codicil duly attested may be a republication of the will.

If we disentangle ourselves from the rule, the declaration of the testator at the publication, as to a former will, must be admitted, because the codicil becomes part of that former will; and the will being attested by three witnesses, the declaration is attested by three witnesses, and does not break in upon the principle of the statute.

Before the statute, any declaration of the testator would have been sufficient to republish the will: since the statute a re-execution seems not necessary, but the declaration must be in writing and attested by three witnesses. With respect to the words used in the declaration, Lord *Hardwicke* might well say, in *Gibson v. Rogers*, that he could see no great difference between the words used there, "I desire that this "codicil may be adjudged to be part and parcel of my will;" and the words, "I confirm or republish my will," which it had been admitted in the argument would have been sufficient.

[\*10]

In the *Attorney General v. Downing*, Lord *Camden* supposed that a particular intent to republish ought to appear, and [\*] that annexation, or a particular declaration, in the codicil, of the intent would be sufficient.

If so, not only Lord *Hardwicke's* opinion, but *Acherly v. Vernon* cannot stand; for, as there was no express republication, but the testator referred to, and made alterations in the will, and gave demonstration that he considered it as his will—and that was considered as a republication: but he had it not in his intention to do any formal act to republish his will.

I am inclined to stand upon the general proposition of Lord *Hardwicke*, and to think that the will before us was republished.

The present case has circumstances that seem to bring it within that  
of

of the *Attorney General v. Downing*. The testator meant his will to operate upon all his lands, and thought that the will was brought down, by the codicil, to the time of his death. He has annexed the codicil to the will, not by wafers or folding them together, but by an internal annexation. So that, in fact, the whole was published together, at the time of publication of the codicil. But I am afraid of replying upon these circumstances, for fear of intrenching upon the statute of frauds, by raising a republication out of evidence in its nature parol: I think it better, therefore, to rely on the general ground.

The next question is, what will be the effect of this opinion upon the cause; upon which I have a doubt. The prayer of the bill seems to seek a declaration from us, that the codicil is a republication of the will, and acts on the after-purchased estate. The question of republication might have been tried at law in an ejectment.

Mr. Hall, for the plaintiffs, (in the absence of Mr. Solicitor General) stated, that the bill charged the estates in question to be affected by a mortgage term then outstanding, that the heir was in the possession, and prayed that the defendants might deliver up such possession to the plaintiffs. That notwithstanding the case of *Bristow v. Pegge*, 1 Term Rep. 758. and other similar determinations in the time of Lord Mansfield, in which it had been held, that, as between the heir and devisee a mortgage [\*] term could not be set up to non-suit the plaintiff in ejectment, but the plaintiff should recover subject to the charge; yet in the subsequent case of *Doe* on the demise of *Hodsdon v. Staple*, 2 Term Rep. 684. a contrary doctrine had prevailed, it having been there determined, that a plaintiff must recover on a legal, not an equitable title, for that a mortgage may be set up as a bar to the plaintiff, even though he claim only subject to the charge; therefore a court of equity alone could, in the circumstances of this case, administer relief.

Lord Commissioner Eyre, assented to this: and declared, that, in those circumstances, the ground for equitable interference was plain, and proceeded to pronounce the decree by which he

Declared the will well proved, and the trusts to be carried into execution, that the codicil is a republication of the will, and the after-purchased estate passed thereby.

After the decree pronounced, Mr. Mitford mentioned a case of *Billing v. Turner*, before Lord Kenyon at the Rolls, where there was a similar decree.

Lord Commissioner Wilson also added the case of [*Doe v. Davy*, Cowp. 158. as of the same sort, though relating to copyholds (3); and] *Heylyn v. Heylyn*, B. R. 15 Geo. 3. Cowp. 130. where the codicil was held a republication, and observed, that the testator, saying "I desire the codicil shall be part of my will" is equivalent to saying they shall be one instrument.

(3) This is from Lord Colchester's MS. Notes, and Mr. Vesey, junior's Rep. p. 499.

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missioner Eyre  
and Wilson.

When a bill  
is filed for discovery  
of matter that  
the defendant  
is not obliged  
to answer, he  
must take the  
benefit of it by  
demurrer. (1)

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## SELBY against SELBY.

(Reg. Lib. 1791. B. fol. 424.)

THIS was a bill filed against the defendant, who claimed as heir at law of the late *Thomas James Selby* Esq. It interrogated very particularly, as to the ancestor or ancestors, under whom the defendant claimed, and, among other things, in what *parish* each and every of the persons by or through whom the defendant claimed to be heir at law of the testator, was or were born, and in what *parish* each and every of such persons was or were baptised, married, and buried respectively.

[\*] In the answer, the defendant said, he could not answer as to the *places of birth, &c.* of some of his ancestors, or set forth to his knowledge or belief where or in what *place, &c.* not using the word *parish*.

The Master, by his report, had certified that he conceived the answer to be sufficient to a common intent.

To this report, the plaintiff took several exceptions, the first of which was, that the Master ought to have certified the answer insufficient, it not having set forth in what *parish* the persons named were baptised, &c.

Upon arguing these exceptions, it was contended by Mr. *Schoyn* and Mr. *Ainge* for the defendant, that the answer was sufficient, and that the particularity of these interrogatories would have been ground for a demurrer, and the case of *Neuman v. Godfrey*, (*ante*, vol. ii. p. 332.) was mentioned, where the party having answered so much of the bill as related to his own interest, he was held not compellable to answer the particular circumstances stated.

On the other side, it was contended, by Mr. *Solicitor General* and Mr. *Richards*, that it had been determined in the cases of *Cookson v. Ellison* (*ante*, vol. ii. p. 252.) *Cartwright v. Hateley*, (vol. iii. p. 238.) and lately, in a case of *Shepherd v. Roberts*, (*ibid.* 239.) that, even when the party might demur, if he submit to answer, he must answer fully.

Lord Commissioner *Eyre* said, it had been constantly the practice in the Court of Exchequer, upon arguing exceptions, to admit the question to be argued how far the party was bound to answer the interrogatories put to him; but he should be glad to take advantage of the rule that Lord *Thurlow* had laid down, in particular cases, and to apply it to all (2); that, wherever the party is not obliged to answer the interrogatories put, he must take advantage of it by demurrer. (3)

(1) See *Cookson v. Ellison*, *ante*, 1 vol. 252., *Cartwright v. Hateley*, *Shepherd v. Roberts*, and *Hall v. Noyes*, *ante*, 3 vol. 238, 239, 483., with the Editor's notes. It is to be observed there are necessary exceptions to this rule in cases of penalty, forfeiture, &c. See Mr. Beames's *Elem. Pl.* 245. 270. with the notes, and 2 Ball & Beatt. 164.

(2) See, however, note (1), *ante*, as to the excepted cases of penalty, forfeiture, &c.

(3) The exceptions were allowed: a demurrer on the part of the defendant having been long previously over-ruled by Lord *Thurlow*. From the notes of Lord *Colchester*, Sir *J. Simcoe*, and Mr. *Cox*. *Et vide* Coop. Ca. Ch. 213, 214.

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[\*] Earl of UXBRIDGE and Others *against* Lady BAILEY [BAYLY].

(Reg. Lib. 1791. A. fol. 565. b.)

**B**ILL by the younger children of Sir Nicholas Bailey, praying that a deed of appointment, executed by Sir Nicholas Bailey, and bearing date March 1767, might be set aside, and the plaintiffs declared entitled to the fund set apart to answer the disputed claim.

Sir Nicholas Bailey and the late Lady Bailey, (who was entitled to one-third undivided part of a large real estate,) in 1753, settled the same to the use of Sir Nicholas and Lady Bailey, for their joint lives, and to the use of the survivor, [*inter alia*] with the following powers: to raise portions for younger children; then to raise 3000*l.* by joint appointment; next to raise 2000*l.* by Sir Nicholas's sole appointment; then to the survivor to raise so much of the above two sums of 3000*l.* and 2000*l.* as should not have been raised by Sir Nicholas and Lady Bailey, under and by virtue of the aforesaid powers; afterwards, to appoint the estate, and in default of appointment, to the younger children of the marriage, as tenants in common; and lastly, power to convey to new trustees, and to change the uses. Sir Nicholas Bailey soon after executing the above settlement, had occasion for a sum of money, and requested Lady Bailey to join in the execution of their joint power of raising 3000*l.* to which Lady Bailey consented (2), provided Sir Nicholas would covenant not to execute his separate power [of raising the above-mentioned sum of 2000*l.*] during her life-time, and whilst the said sum of 3000*l.* remained due, without her consent.

Lady Bailey died in 1766, [whilst the 3000*l.* remained due;] in 1767, Sir Nicholas Bailey having intermarried with defendant, by deed poll appointed the said sum of 2000*l.* which he was empowered to raise under the aforesaid power, or under any other power, to be paid to his executors, for payment of debts and legacies, or for such purposes as he should declare and appoint. (3) — At this time [also] the 3000*l.* was due.

In 1779, Sir Nicholas Bailey, by deed, preparatory to a conveyance for the purpose of partition, recited, that he had not charged the estate the appointment is good, the intent of the covenant being only for the wife's benefit in case

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Lords Commissioners  
Eyre, Ashurst,  
and Willes,  
June 28th, 28th.  
[Vide S. C.  
1 Ves. Jun.  
492. (1)]

There being a power in the marriage settlement to husband and wife to raise a sum of money, and dispose of it by joint appointment, and a power to the husband to dispose of a second sum by his sole appointment; upon an appointment of the first sum, the husband covenants not to exercise his sole power during the wife's life and whilst the former sum is unpaid, without her consent: she being dead, he disposes of the latter sum (the first being undischarged); of survivorship.

(1) The Editor begs to refer the Profession to Mr. Vesey junior's report of this case, which is much more full and accurate.

(2) It appears stated by the bill, and admitted by the answer, "that Sir N. B., in order to induce Dame Caroline his wife to join in raising the 3000*l.*, agreed not to execute the power of raising the 2000*l.* for his own use, and that he having raised the 3000*l.* under the agreement with his Lady, executed a deed poll, dated 31st July, 1753, which was indorsed on the indenture of 17th April, in that year, whereby after reciting that it had been agreed between him and Dame Caroline his wife, that he should in pursuance of the power reserved to him alone, charge the premises with 2000*l.*; and that he and his wife should in part execution of the power reserved to them charge the premises with 1000*l.*, part of the said 3000*l.* which Sir N. and Dame C. his wife had a joint power of charging, &c.; but that for the more speedy raising the 3000*l.* Dame Caroline had afterwards agreed to join with him in the execution of the power reserved to them jointly; and after reciting the indenture of mortgage, [whereby the 3000*l.* thus agreed had been borrowed] the said Sir N. B. thereby covenanted that he would not at any time during the life of Dame Caroline, and so long as the said 3000*l.* remained due to the mortgagee, charge the premises with any sum whatever, by virtue of the power reserved to him alone under the said indenture, or by virtue of any other power whatever, without the consent of Dame Caroline in writing." The bill then stated that Lady B. died, in 1766, whilst the 3000*l.* remained due to the mortgagee without having executed any such consent, &c. The answer admitted the above facts.

(3) The bill alleged that Sir N. B. kept this deed concealed till his death. R. L.

in

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Earl of  
Uxbridge  
against  
Lady Bailey.  
[\*14.]

in any manner, except with the aforesaid sum of 3000*l.* and conveyed to trustees, who were also trustees of the marriage-settlement.

[\*] Partition was afterwards made. (4)

Sir *Nicholas Bailey* died, having, by will, appointed, defendant Lady *Bailey* his sole executrix, and residuary legatee. The younger children, upon the death of Sir *Nicholas Bailey*, became entitled to the estate, and having agreed to sell the same to Sir *George Heathcote*, it was discovered before the purchase was completed, that Sir *Nicholas Bailey* had executed his separate power of raising 2000*l.* which appointment the plaintiffs impeached.

Mr. *Solicitor General*, Mr. *Lloyd*, and Mr. *Hollist*. First, the appointment is bad, as being against the covenant of 1753. Secondly, as being revoked by the deed of 1779.

In support of the first objection it was insisted, that the spirit and terms of the agreement required the 3000*l.* to be paid off, and that nothing but Lady *Bailey's* consent could dispense with such previous condition.

That the word "and" ought to have been "or" and that equity in many cases will give to the word "and" the same construction as the word "or."

Upon the second point it was contended, the deed of 1779 furnished very strong evidence that Sir *Nicholas Bailey* did not intend the deed of 1767, to be enforced, and it was further contended, that the deed itself operated as a revocation, it being under a power to appoint new uses, &c.

Mr. *Attorney General*, Mr. *Mitford*, and Mr. *Fonblanque*, on the part of the defendant Lady *Bailey*, insisted that the terms of the covenant were clear and explicit with reference to a natural and reasonable intention, which was merely to secure to Lady *Bailey*, as large a benefit under the power as possible, in the event of her surviving Sir *Nicholas Bailey*. And that to support the construction contended for, it would be necessary to strike out the words "during her life," and to substitute "or" for "and;" besides it was admitted, even by their construction that Sir *Nicholas Bailey* might have raised the whole 5000*l.* if he paid off the 3000*l.* to require which, would be imposing a difficulty without any possible benefit to any of the parties. That as to [\*] the circumstance of the deed being in the possession of Sir *Nicholas* at the time of his death, it was where it ought to be, and that no inference of intent could be drawn from the deed of 1779, the sole purpose of that deed, being to make partition of the estate, and that in point of law such deed did not operate a revocation of the deed, though merely voluntary.

The Lords Commissioners (5) were of opinion that the intent was sufficiently explicit to preclude all doubt, and that the deed of partition certainly would not have been a revocation, if the deed of 1767 had been in favour of a purchaser, and that, as no case or authority was referred to in support of the distinctions contended for, they held that the deed of 1767 should not be affected by the deed of 1779.

Bill dismissed. (6)

(4) And the bill alleged that no kind of notice was afterwards taken of the deed poll of 1767. R. L.

(5) See the judgment at length, 1 Ves. jun. 507. *et seq.*

(6) So much of the bill as prayed that the deed poll of 1767 might be declared void or fraudulent, and to be delivered up to be cancelled, and as prayed that the defendant might release her right and interest under the said deed; but without costs. The Court declared the 2000*l.* to be a good and subsisting charge, &c. R. L., and 1 Ves. jun. 511.

1792.

CAMPBELL and Others *against* CAMPBELL and Others.

(Reg. Lib. 1791. A. fol. 734.)

Rolls, 4th July,  
1792.

**SUSANNAH HODSDON** made her will, dated 2d July, 1780, and thereby, after giving several legacies, and among the rest, "to the four children of her sister *Lewington*, 50*l.* a-piece, on their severally attaining the age of twenty-one years, but if any of them shall die under that age, without leaving lawful issue, the said legacy or legacies given to such of them as shall die under the age of twenty-one years, shall go to the survivors equally, and if only one of them survives to the age of twenty-one years; then such survivor to take the whole 200*l.* but declaring always, that it is my will, that such of them dying under the age of twenty-one years, if any, as shall leave lawful issue, such issue (and if more than one, equally) shall take the parent's legacy," she, as to the rest and residue of the money to arise from the sale of her estate, both real and personal, directed that the same should be divided into three equal parts, and gave "one just and equal third part thereof unto and amongst the child and children of her sister *Rose Campbell*, that should be living at the time of her decease. She gave another just and equal third part thereof, unto the child or children of her niece *Elizabeth Lewington*, which should be living at the time of her [\*] decease, and she gave the other just and equal third part thereof unto and amongst the children of her niece *Catharine Buticaz*, which should be living at the time of her decease, and directed her estate real and personal to be turned into money, to fulfil the purposes of her will, and appointed the plaintiffs and defendants *Glasse* and *Buticaz* executors." The bill prayed usual accounts, and that the residue might be divided into thirds, and one third be paid to or secured for the defendant *John Hodsdon Campbell*, an infant; one third for the defendants *Thomas, Henry, Robert*, and *Susannah Lewington*; and the remaining third part might be secured for defendants, *Philip* and *Susannah Buticaz*.

At the time of the testatrix's decease *John Hodsdon Campbell* was the only child of *Rose Campbell*; *Philip Buticaz*, and *Susannah Buticaz*, were the only children of *Catharine Buticaz*; and the defendants *Thomas, Henry, Robert*, and *Susannah Lewington* were the only children of *Elizabeth Lewington*.

The cause was heard May 2, 1785, when his Honor declared the will well proved, and that the same ought to be established, and the trusts carried into execution, and directed proper accounts.

The Master made his report, and found the state of the families as stated.

*Henry Lewington* was since dead.

And the questions were, Whether the children of the then families, and particularly the four surviving ones of the *Lewington* family took their shares of the residue as joint-tenants, or tenants in common?

The question had been argued, and came on this day for judgment.

Just as his Honor was preparing to pronounce judgment, Mr. *Lloyd* proposed, that the question as to the *Lewington* family should go to law. Afterwards, upon his Honor's saying, he should nevertheless make a decree, as to Mr. *Hollist's* clients, the *Buticazs*, Mr. *Lloyd* withdrew his proposal, and his [\*] Honor proceeded to state the will, and that in

A legacy given to two or more persons, without words of severance, makes a joint-tenancy; therefore his Honor determined that where, in a will, as to a residue, two thirds were given to and amongst the children of A. and B. they took as tenants in common, but the remaining third being given to the children of C. they took as joint-tenants.<sup>(1)</sup>

[\*16]

[\*17]

(1) Vide *Perkins v. Bayntun*, *antea*, 1 vol. 118. with the Editor's note. 2 Roper on Legacies, 259. et seq.

the



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 CAMPBELL  
 against  
 CAMPBELL.

the clauses as to the residue, in those relating to the children of *Rose Campbell* and *Catharine Buticaz*, the gift was to and amongst the children, but that in the gift to the children of *Elizabeth Lewington*, the words *and amongst* were omitted, and went on to this effect.

The question is, What interest the children take? And first whether the children of *Rose Campbell* would have taken as joint-tenants or as tenants in common. However the Court might formerly lean to the construction of wills so as to create joint-tenancy, it has now for many years found the inconvenience of that construction, and has laid hold of any words in a will that will favour the construction of tenancy in common. For this purpose, it has laid hold of the words *equally, share and share alike, to and between*. Then what difference is there between those words and the word "amongst?" It is said there is no case where the word *amongst* has had this construction; but Mr. *Hollist* has produced the case of *Trundell v. Eames*, before Lord *Bathurst*, 11th February, 1773, where the words were so construed: there *Joseph Lane* gave as follows: "I give and bequeath the interest, dividends, and profits of my 500*l.* Bank annuities, to my loving sister-in-law, *Hester Lane*, to be received by her, or her assigns, for and during her natural life, from time to time as the same shall become due and payable; and from and immediately after her decease, I give and bequeath, will and order, that my said Bank annuities shall go to and amongst my cousin *Sarah Millet*, widow, and her children:" and it was there decreed, that the legatees were tenants in common: it is in the Register's Book of 1772, fol. 608. b. The rule is, that if there are no words to sever the interest, legatees must take as joint-tenants; but the word *amongst* must signify severance, or it would not mean any thing; and the Court has given it that effect. — A similar construction has been in *Heath v. Heath*, 2 Atk. 121. and in *Rigden v. Valier*, 3 Atk. 731. upon similar words. But it was insisted upon, that this was a case which did not admit of a joint-tenancy, being the case of a legacy. I did not think there was a doubt that legatees might take as joint-tenants. But *Perkins v. Bayntun* (*ante*, vol. i. p. 118.) was cited, where Lord *Thurlow* seems to have thought otherwise. In *Draper's* case, 2 Ch. Ca. 64. Lord *Chancellor* did not like the doctrine that executors should take as joint-tenants, and said that it must be so, "since the [\*] judges will have it "so:" but that case has been since settled to be so. (2) In *Webster v. Webster*, 2 Peere Wms. 347. they were merely residuary legatees, and yet were held to be joint-tenants. Both in that case and in *Cray v. Willis*, 2 Wms. 529. it was held that unless there are words to sever it, it must be a joint-tenancy. In *Cray v. Willis*, there is much reasoning upon the assent of the executor; but I cannot conceive that the executor giving or not giving his assent can vary the rights of parties, whether there was or was not an assent, the matter would remain the same. The same general doctrine is recognized by Lord *Talbot*, in the case of *Stephens v. Hide*, Forrester, 27. In *Perkins v. Bayntun* there are two points determined; the one is that *between them*, will sever the interests; but it was doubted whether joint-tenancy applies to a legacy: Lord *Chancellor* there refers to the case of *Warner v. Hone*, 1 Eq. Abr. 292.: but, upon looking into the book, that case contained the words *equally amongst them*, and the same words appear in the other report of the same case, Prec. Ch. 491. (3) He also cites *Sanders v. Ballard*, 3 Ch. Rep. 214. which was certainly so; but that case has been considered as over-ruled by Sir *Joseph Jekyll*. In fact, this was not the point before

[ \*18 ]

(2) *Vide etiam*, per Lord *Eldon* C., 9 Ves. 597, 598.

(3) See this observed upon by the Editor in note to *Perkins v. Bayntun*, *ante*, 1 vol. 118.

Lord *Thurlow* in *Perkins v. Bayntun*, and he cited the cases only as stating the question. I take the law, therefore, to be, that where a legacy is given to two or more persons, whether they are made executors or not, that they are joint-tenants.

Then the next question is, whether there is any thing here to shew he meant to introduce words of severance. She has interposed words of severance in the two former cases, and has omitted to do it here. With respect to the *Lewingtons*, it is said, she could not mean differently as to these children from what she did as to the others, but I cannot follow that reasoning; here are no words of severance. It is said that is the blunder of the clerk: but it is more essential to the purposes of justice, that there should be fixed rules of construction, than that a judge should form conjectures as to the intent of the testator. I am therefore of opinion that the words are not, in this case, sufficient to sever the interests, but that it was a joint-tenancy and has survived.

[\*] With respect to the direction as to maintenance, there must be a direction to the Master to enquire by whom the children have been maintained, and what has been expended.

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CAMPBELL  
against  
CAMPBELL.

[\*19]

MASTER against FULLER.

(Reg. Lib. 1791. B. fol. 304. b.)

*Lincoln's Inn  
Hall, 7th July.*  
Lords Com-  
missioners  
*Eyre, Ashurst,  
and Wilson.*  
[Vide S. C.  
1 Ves. jun. 513.]

A BILL filed by the plaintiff *Master*, as executor of his late wife *Martha Master*, praying an account of monies paid by her to the defendant, and to have an agreement entered into by her to pay the defendant an additional rent, delivered up.

The bill stated, that the defendant let the plaintiff a house, at the rent of 20*l.* under a lease, bearing date 29th *November*, 1771, and that the plaintiff had discovered that soon after, *Martha* (who was entitled to the rents and profits of a real estate, as her own separate property) had entered into a private agreement to pay the defendant a further rent of 18*l.* in consideration of the house being differently fitted up, and had paid such additional rent till her death. This agreement with the wife, the bill charged to be a fraud on *Martha Master*, and obtained by improper means, that the house was not extraordinarily fitted up, and was not worth more than 20*l.* a-year.

The defendant in his answer denied any imposition upon the plaintiff's wife, and stated that the agreement was drawn up by her own solicitor, and that the house was fitted up by her own direction, and according to her own fancy, and that the original and additional rents made but a moderate rent for the house.

It was in evidence that the defendant had put up the house to sale, and had, upon that occasion, represented it as a house let for 20*l.* a-year.

*Mr. Mansfield* for the plaintiff.

[\*] The merits of the case lie in a small compass, and go upon a familiar principle. The object of the bill is to recover the money paid by the wife under this agreement, which was a fraud upon the plaintiff, who thought he had a house at 20*l.* a-year, and did not know that any more was to be paid for it, much less that there was a further rent to be paid out of his wife's fortune. It is no answer, that that payment was nothing to him, as she might give away her property. That argument is false, as the husband is hurt by it. The wife having separate property,

A married woman having separate property agrees with the landlord [without her husband's knowledge] to pay an additional rent, for her husband's house, in consequence of having it better fitted up: she dies, and the husband files a bill for the return of the money, and to have the agreement delivered up as fraudulent on him: bill dismissed.

[\*20]

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*MASTERS  
against  
FOLKNER*

property; it is true she may bind it: but all such agreements with respect to it are a fraud upon the husband, because he has a just expectation of a benefit from that property. Here it was a fraud, as the agreement related to a subject for which the husband was to pay; and it drew the husband into an agreement, which he would not have entered into if he had known of this underhand agreement with the wife. Clearly this agreement is injurious to the husband: but, if it was not so, as relating to the separate property of the wife, being a fraud, Mrs. *Master* would have a right to be relieved against it, if she were alive; and the husband has the same right, as her representative. It stands on the same principle as an agreement or bond to return part of a portion on marriage. There, though there is no issue, and the husband sues who gave the security, he is relieved, because the bond is founded in fraud. *Redman v. Redman*, 1 Vern. 348.; *Gale v. Lindo*, S. B. 475. where the persons who sought relief gave, or were privy to, the securities. *Neville v. Wilkinson*, (*ante*, vol. i. p. 543.) is another case, where the party was prevented from having the benefit of an agreement, because fraudulent as to other persons. As where a debtor gives up his property to his creditors, and one creditor takes a security for a larger sum, the Court will relieve, because it is a fraud on the other creditors. There, though in fact no injury is done, it is set aside, because fraudulent as to third persons. So here the agreement was a fraud upon the husband; and those who stand in the wife's place have a right to be relieved by having it repaid. And it is proved the house was not worth more than 20*l.* a-year, and the agreement with the wife was kept a secret from the husband.

But the Lords Commissioners, without hearing counsel for the defendant, dismissed the bill.

[ \*21 ]

*In Court during  
term.*

*Lincoln's Inn  
Hall, 10th July.*

Lords Com-  
missioners  
*Eyre, Ashurst,  
and Wilson.*

[S. C. 1 Ves.  
jun. 514.]

*A. by marriage  
settlement pro-  
vides an an-  
nuity for the  
eldest son of  
the marriage:  
he afterwards,  
by his will,  
gives to the  
eldest son a  
real estate for  
life, with re-  
mainders over,  
and confirms the settlement: the eldest son must elect between this provision and the annuity. (1)*

[\*] BLAKE against BUNBURY.

(Reg. Lib. 1791. A. fol. 682. b.)

THE late Sir *Patrick Blake*, then an infant, by virtue of an act of parliament enabling him so to do, by indenture, bearing date 13th April, 1762, and made previous to, and in contemplation of, his marriage with *Annabella*, the daughter of the Rev. Sir *Wm. Bunbury*, Bart. and for making provision for an eldest son of that marriage, granted to the trustees in that indenture, a clear rent charge of 2000*l.* to be issuing and payable half-yearly out of all his plantations, lands and hereditaments, slaves and appurtenances, in the island of *St. Christopher* in the *West Indies*, and to commence from the death of the said Sir *Patrick Blake*, in trust for the first son of the said intended marriage in tail-male, with remainder to the second, and other sons in tail-male; and demised the said plantations to the trustees for a term of 2000 years, in trust for better securing the said rent charge. There was a proviso, that this rent charge should cease upon Sir *Patrick Blake's* settling, within a limited time, lands in *England* of the same value, to the same uses.

(1) Upon the subject of election, the most comprehensive and elaborate statement of all the authorities will be found in Mr. *Swanston's* valuable notes to *Dillon v. Parker*, in the first volume of that gentleman's Reports, p. 381. *et seq.* and 394. to 409.

By

By indenture, bearing date 19th June, 1778, between Sir Patrick Blake, and the trustees therein named, Sir Patrick Blake granted his manors of Langhorne, and Bardwell, in the county of Suffolk, to secure the sum of 15,000*l.* in trust for his younger children.

Sir Patrick Blake, by his will, dated 3d June, 1784, devised all his real estates in the island of *St. Christopher* in the *West Indies*, and also in *Great Britain*, to trustees, in trust, to convey the same to the said trustees for a term of 500 years, in trust, with the rents of the said estates, or by sale or mortgage thereof, to raise such sum of money, as, with the money produced by the testator's real estate, should be sufficient to pay the annuities therein given, and to raise certain sums of money payable at the times, and in the manner therein mentioned, and, subject to the said term, to the use of the plaintiff (by the name and description of his eldest son Patrick Blake) and his assigns [\*] for life *sans waste*, remainder to trustees to preserve contingent remainders; remainder to his (plaintiff's) first and other sons in tail-male; remainder to testator's second son in like manner, with divers remainders over, with an ultimate remainder to his (testator's) right heirs: with powers to the tenants for life, when in possession, of jointuring, charging with portions for younger children, and leasing; and the testator devised lands, for the purchase of which he had contracted, and his house in *Portland Place* to similar uses: and the testator devised all his plantations, &c. in the island of *Montserrat* in the *West Indies*, to the same trustees for 500 years, to commence at his death, *sans waste*; in trust out of the rents and profits, or by sale, to raise 7000*l.* for his younger son, *James Henry Blake*, at twenty-one, or, in case he should die before that age, to sink into the estate, and subject thereto, he gave the said plantations, &c. in *Montserrat*, to his son (the plaintiff) *Patrick Blake* for life, with remainders over: and he did thereby ratify and confirm the settlement, whereby his said son *James Henry Blake*, and his said daughter *Annabella Blake*, his only surviving younger children by his late wife, would be entitled to the sum of 20,000*l.* in equal portions, so far as the same related to his said children, and gave his personal estate, after payment of debts, &c. and completing the said contract, unto his said son the plaintiff, in case he should attain twenty-one, his executors, &c. and appointed the trustees executors of the will.

The plaintiff's bill prayed that the trustees might execute a conveyance or settlement of the estates of the testator, according to the directions of the will, and that possession of the said estates and of his estates in the island of *Montserrat* might be delivered to plaintiff, he submitting to keep down the annuities, and other sums charged thereon, and for an account of the personal estate, and possession thereof.

The defendants admitted the facts, but the trustees in their answers stated, that the personal estate of the testator was deficient, and the other defendants who were remainder-men in the settlement, or had charges on the estate, submitted in what manner the testator's debts, and the several legacies and annuities should be paid; and whether possession of the estates ought to be delivered to the plaintiff as is claimed by his bill, [\*] and prayed proper directions for payment of their charges and annuities.

This raised, at the hearing, a previous question, whether the present plaintiff, and those who claim under the settlement, are entitled to take the rent-charge under the settlement, and the estates subject to the rent-charge and other benefits under the will; or this is a case in which the plaintiff and those who claim the rent-charge under the settlement, are to be put to their election.

Mr. Solicitor General and Mr. Graham for the plaintiff, argued, that it did not appear from the will that the testator had any intention of

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Blake  
against  
Buxton.

[\*22]

[\*23]

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~~Deeds~~  
against  
Benson.

satisfying the annuity, and it must appear so, in order to have that effect. That the principle of equity is, that, where a party taking under a will has a title paramount the will, that he must elect under which he will take; but the intent of the testator that he shall do so, must appear by express words or declaration plain: *Noys v. Mordaunt*, 2 Vern. 581., *Strentfield v. Streatfield*, For. 176., and *Pulteney v. the Earl of Darlington* (*ante*, vol. i. p. 223.) The interests given here were perfectly different. There are no words to shew he meant to satisfy the annuity. By the confirmation of the settlement as to the younger children's fortunes, he did not mean to affect the annuity which he does not mention.

Mr. Mansfield and Mr. Preston, for the defendants, admitted this was a question of intention, but contended that here the testator only intended to give one provision, and where he confirmed the settlement as to the younger children's portions, he had forgotten the provisions made for the eldest son. If forgotten, it falls within the case of *Warren v. Warren*, (*ante*, vol. i. p. 305.) They resembled it to the case of an annuity given to a dowress, being a satisfaction for dower, though not mentioned as such in the will, and cited the cases of *Arnold v. Kempstead*, Amb. 466., *Villareal v. Lord Galway*, Amb. 682., and *Jones v. Collier*, Amb. 730., which they insisted were not affected by *Foster v. Cook*, (*ante*, vol. iii. p. 347.) where Lord Thurlow said he did not see sufficient to make it a satisfaction.

[ \*24 ]

[\*] Mr. Solicitor General, in reply, went largely into the question of intention: with respect to the cases as to dower, he said, they were answered by *Pearson v. Pearson*, (*ante*, vol. i. p. 292.) which shewed that, wherever the annuity was consistent with the dower, it was held not to be a satisfaction; by that of *Foster v. Cook*, where Lord Thurlow followed the authority of *Pitts v. Snowden*, (stated in the note vol. i. p. 292.) and rejected that of *Villareal v. Galway*. That both this case and *Arnold v. Kempstead* were decided on the ground of being inconsistent with the dower. In the present case there is no inconsistency in the plaintiff's taking both the annuity and the charged estate.

The cause stood over for a few days, and

Lord Commissioner Eyre, this day, after stating the case, pronounced the judgment of the Court, to the following effect:—

The question is, Whether the present plaintiff is entitled to take the rent-charge and other benefits under the settlement, together with the estate subject to the rent-charge; or it is a case where the plaintiff is to be put to his election. (2)

It is the settled doctrine of a court of equity, and agreed on all hands, that no man shall disappoint the will under which he takes; therefore, if a man gives to B. lands to which he has no title, and which are the estate, and in possession of A. (to whom he gives, by the same will, other parts of his estate;) A. must elect, and convey his estate to B. or he cannot take the benefits under the will. It is only a modification of this rule, where the testator, who has, in his life-time, by settlement subjected his property to particular incumbrances upon it, afterwards devises it free from incumbrances, and wherever that is done, the persons who take under the settlement, or others who derive interests under the will, must permit the estate to go in the new channel which the will has made. The putting devisees under a will to an election, is a strong operation of a court of equity (3)—and I agree that the disposition, by the testator, of what he had no right to dispose of, must appear upon the face of the will by declaration plain, or by necessary conclusion from the circumstances disclosed by the will; for no man is

(2) *Vide* 1 Swanston, 420, 421., &c.

(3) *Ibid.* 421., &c.

to be deprived of his property by guessing or conjecture. On the other hand, the Court is not to refuse attention to what amounts to a moral certainty of the testator's intention, where that is to be gathered either from the state of the property or the purview of the will.

After these preliminary observations, I proceed to examine the nature of the instruments.

The rent-charge is a branch of a family settlement; it provides not only for an eldest son, but for a jointure, and portions for younger children.

The rent-charge, in particular, is a provision for the eldest son; but the settlement must be looked upon in two views, not only as a rent-charge for the eldest son, to the extent of 2000*l.* a-year, but as a provision for the family.

The will should be seen in the same view, as a general settlement of large property (and *inter alia* of the very same property out of which the rent-charge was to issue) to his sons, his daughters, and the collateral branches of his family. The first observation which occurs upon it is, that they are both in *pari materid.* I think it appears plain upon the face of the will, that the testator had the settlement before him—he refers to it in one part, where he is adding to the provision for his second son, and we are not at liberty to act upon so remote a conjecture, as that he forgot the provisions for his eldest son, and remembered that for the younger. The will entirely purports to devise the whole estate at *St. Christopher's* with the stock, &c.; for, admitting the rent-charge to be a subsisting incumbrance upon it, it is not a particular estate like dower, nor takes the estate out of him like a mortgage; therefore he meant to dispose, and he did dispose, of the whole estate, as every man does who has an estate subject to incumbrances. The argument, that he must be taken to have meant to dispose of only such part of it as the rent-charge had left him, does not apply: nor does the consideration as to the interest which he had in property, which, if exercised, might be part of his personal estate; he did not mean to pass that interest by words unapt for the purpose.

[\*] Where an estate has incumbrances upon it, the gift of the estate does not shew that it is to go to the devisee without incumbrances. It goes no further than to give the whole. The incumbrances must prevail by their own weight.

Here he meant, by his will, to dispose of his whole estate; the will purports that the term was to commence immediately; it appropriates to its own purposes the whole rents and profits: and here it becomes inconsistent with the settlement, which had appropriated the rents and profits to the raising 2000*l.* a-year for the eldest son.

This seems to throw the *onus probandi*, as to the intention of the will, upon the plaintiff, and to call upon him to shew that the testator intended not to dispose of the whole rents and profits, but of such part only as should remain, after satisfying the rent-charge.

In order so to understand the will, we must look to matter *dehors* it; for we never could collect, from the words of it, that he meant to dispose of less than the whole; and having disposed of the whole estate, out of which the rent-charge was to arise, the person taking the rent-charge must submit to that disposition.

But let us see, whether there was not a particular intention, apparent on the face of the will, to substitute the one provision for the eldest son and those who might claim under the settlement, instead of the rent-charge granted by the settlement. It is clear that he meant to provide for the eldest son, and those who might stand in his place.

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BLAKE  
against  
BUNBURY.

The courts of equity lean against double portions for the benefit of families.

The nature of the incumbrances created by the will, and, without looking out of the will for other heavy charges to which the estate was subject, render it impossible to suppose he meant the charge to accumulate.

[ \*27 ]

If he meant to substitute the one for the other, the eldest son would want a maintenance, if it was cumulative he would not; [\*] but the testator has given a maintenance to the extent of 800*l.* a-year, which raises a violent presumption that he had made a substituted provision unproductive of maintenance, for one productive of it.

This appears from the part of the will, which is cumulative—the provision for the second son: the provision for him being cumulative, he had maintenance under the settlement, which the testator ratifies; it was supposed in the argument that he had not the provision, by the settlement not taking effect till the death of his mother, but the 20,000*l.* 3 per cents, were sold out and produced 15,000*l.* which was lent to Sir Patrick Blake, on mortgage, which was declared to be for the younger children.

And this will be an answer to the question asked in the argument, whether the plaintiff was to give up his contingent interest in this 20,000*l.* He has no longer a contingent interest in it under the settlement; if he had, I should say no. The testator has not affected to give it away, and consequently the question of election cannot apply to it.

This provision being cumulative, and the former producing maintenance, Sir Patrick Blake provides, that the cumulative provisions should not produce maintenance.

If I was asked why he did not express his intention as clearly to satisfy the claim of the elder son under the settlement; I can see no reason; but the will being ill drawn, can make no difference in its effect. He might think he was fully satisfying the rent-charge, by giving his son a better thing, which included the rent-charge. He might not attend to the difference as to the plaintiff being able, as tenant in tail, in the case of the rent-charge, to bar the remainders by a recovery. It is probable he considered the rent-charge as that which was to descend to the plaintiff's first and other sons, with remainder to the second son in strict settlement, as the estate is to do. Whether he had the settlement before him or not, whether he remembered or forgot the rent-charge, is of little consequence to the real point in the cause. He has made a disposition inconsistent with that made by the settlement, and there is strong evidence of particular intention to make the provision in the way he has done [\*] it. And by the words he has used, he must be taken to have known of the settlement. Therefore the will being inconsistent with it, the plaintiff, by the known practice of courts of equity, must be put to his election.

[ \*28 ]

I avoided encumbering the matter with cases of dower. Whether those cases are well or ill determined, is not the question here. Tenancy in dower is an estate in part of the land, different from the estate in the other part of the land. Testators passed their *own* estates, and this was not *theirs*. There a particular intent must be made out; and here it is, that judges have differed, or seemed to differ, upon the subject, no two cases being precisely the same in circumstances.

But the rule, and the application of it to cases must be our only guide: and the Court is of opinion, that the plaintiff is put to an election.

The plaintiff afterwards signifying his intention to take under the will, the Court ordered that he be let into possession, on giving security, to the

the amount of 10,000*l.* to abide such order as the Court might make, [and undertaking to keep down] the annuities and other incumbrances on the estate, &c. (3)

(3) And consenting that in case of any failure, the parties might be at liberty to apply for a receiver and manager of the estates. R. L.

1792.

BLAKE  
against  
BUNBURY.

SPURRIER against MAYOSS.

(Reg. Lib. 1791. B. fol. 303.)

Lincoln's Inn  
Hall, 12th July.

Lords Com-  
missioners,  
Eyre, Ashurst,  
and Wilson.

[S. C. 1 Ves.  
jun. 527. (1)]

[To constitute  
usury there  
must be a debt;  
therefore a]  
purchase of  
houses for  
430*l.*, 200*l.*  
to be paid in  
money, and  
the remainder  
on a future  
day, possession  
to be given  
immediately,  
and in default  
of payment, to  
pay a rent of  
42*l.* till pay-  
ment: this is  
not an usurious  
contract. (1)

[ \*29 ]

THE bill prayed that the defendants might be decreed to complete their purchase of certain houses.

The defendants insisted that the contract for the purchase was usurious.

The agreement was, in substance, as follows: 1780, Memorandum—We have this day purchased of *Spurrier*, the houses situate in for the sum of 430*l.* of which we have paid the sum of 200*l.* in two notes, and agree to pay the remainder on or before Michaelmas-day next, with 5 per cent. [\*] interest, or if we fail, then to pay a rent of 42*l.* per annum, in lieu of interest, subject however to a deduction of 5 per cent. for so much of the remaining sum of 230*l.* as shall be then paid. — Possession was delivered to the defendants.

The Master of the Rolls (Lord *Kenyon*) decreed, the purchase to be completed; from which decree the defendants appealed.

Mr. *Mansfield*, and Mr. *Richards*, in support of the appeal, contended, that wherever a creditor allowed his debtor to retain money in his hands, for which he receives more than 5 per cent. it is usury. That, in the present case, the contract was complete, which differed it from an executory contract; for, by its being complete, the defendant became entitled to the houses, and the plaintiff to the money. It must therefore be considered as if the plaintiff had lent to the defendants the money.

Mr. *Solicitor General*, Mr. *Mitford*, and Mr. *Hollist*, for the defendants, contended that there was no colour for imputing usury to this transaction: upon delivery of possession under the agreement, it might be thus construed, you are purchasers, though not entitled to possession until the purchase-money is paid, I will let you, therefore, have possession as tenants, but not as purchasers, till the purchase-money is paid.

The defendants might at any time have relieved themselves from the rent, by determining the character of tenants, Hawk. P. C. 245. Cro. Jac. 509. *Floyer v. Edwards*, Cowp. 114.

The plaintiff might have legally agreed, that the defendants should pay a certain sum at a particular time, and if they failed of payment by the day, they should pay so much more.

The circumstances of the case show that the bargain was by no means hard or unreasonable, and that the plaintiff could not have maintained any action at law for any certain sum, but must have relied on what he could recover in the shape of damages, consequently the contract could not be considered as complete, which was the ground relied on, to prove that it was usurious.

(1) See the report, 1 Ves. jun. 527. &c., which is much more full and satisfactory.



1792.

*Squarize  
against  
Mayes.*  
[\*30]

[\*] Mr. *Mansfield*, in reply, insisted that the contract was complete by the delivery of possession, and that taking more than 5 per cent., after the time agreed on for the payment of the principal, made the contract usurious.

Lord Commissioner *Eyre*. (2)

The language of the agreement gave it to my mind the appearance of usury; but when one defines usury, and looks at the spirit of the agreement, the first impression does not seem sufficiently strong to sustain the defence.

Usury is the taking of more than 5 per cent. for the forbearance of a debt.

The first question therefore is, Was there a debt? I think not: The whole rested upon an executory agreement, which, for performance, depended on many circumstances which might prevent its ever becoming a debt.

This, however, is a narrow ground—take it on the more general ground, as disclosed by the proceedings, the contract was for a title, and almost for ready money.—Possession, till the completion of the title, was a fair subject of contract between the parties.

In the event of the money not being paid, a new idea appears to have occurred to the parties, as to the possession.—The bargain for title was to be suspended, and a new relation to arise between the parties, namely, that of landlord and tenants. If so, there is nothing usurious. If they turned themselves into those characters, the plaintiff might well be considered as entitled to rent till he put the estate out of him. The language of the agreement ought not to control what I conceive to have been the substance of it: and as it is an executory agreement the Court has more room to give it a liberal construction.

Lord Commissioners *Ashhurst* and *Wilson* of the same opinion.

Decree affirmed.

(2) See the separate judgments of the Lords Commissioners, *seriatim*, 1 Ves. jun. 531. *et seq.*

[\*31]

[\*] WHITTAKER *against* WHITTAKER.

{Reg. Lib. 1791. B. fol. 576. entered *Whittaker v. Prime*.}

*Rolls*, 12th July.

Testator contracts for a particular estate, but dies before the purchase is

completed, afterwards, from the state of his affairs, the contract is dissolved: yet the purchase-money shall not sink into his personal estate, but it shall be laid out in other lands, to the same uses as he had devised the land contracted for. (1)

**WILLIAM WHITTAKER** Esq. by will dated 5th January, 1782, after giving several specific and pecuniary legacies, gave to *John Marlar* and others, their heirs and assigns, certain premises situate at *Sowerby*

(1) Lord *Eldon* C., after expressing his dissent from many points in this case, observed, in his elaborate judgment to *Broome v. Monck*, 10 Ves. 619., that it was "very difficult to maintain the doctrine, [here stated] which went beyond what was necessary for the decision." And his Lordship, in that case, decided that a devisee who claimed the benefit of a contract for a purchase, had no claim on the personal estate, where the title had proved defective. See 10 Ves. 597. to 622. Lord *Eldon* C. also there held decidedly, that a devisee and an heir must be on the same footing (contrary to several of the dicta in the principal case). His Lordship's remarks seem so apposite that it may be useful to subjoin some of them here in one connected view. (See 10 Vesey, 607.)

"The decree [in *Whittaker v. Whittaker*] decided only, first, that an individual shall

*Sowerby* near *Halifax*, at *New-Church*, *Lancashire*, and at *Totteridge*, to the use of (the plaintiff) his nephew *Abraham Whittaker*, for life, *sans waste*, remainder to trustees to preserve contingent remainders, with divers remainders over — and then (*inter alia*) reciting, that he had contracted with *Robert Mackreth* Esq. for the purchase of an estate in the county of *York*, theretofore the estate of *Sir George Metham*, for 7950*l.* he gave to the trustees all the residue of his goods, chattels, estates, &c. upon trusts thereafter expressed; one of which trusts was “to collect and get in the same, and dispose of a sufficient part thereof, and therewith, in the first place, to pay the remainder of the purchase-money to said *Robert Mackreth* Esq.; and to complete the contract with him in all respects whatever, and thereupon to take from said *Robert Mackreth*, or his heirs, and from all other necessary parties, a conveyance of said estate so contracted to be purchased of said *Robert Mackreth*, in such manner as counsel should direct, so as that the same estate might be legally conveyed to said trustees, their heirs and assigns, to such uses and estates, in favour of his said nephew *Abraham Whittaker*, and with such remainders over, and subject to such and the like provisos, con-

1793.

WHITTAKER  
against  
WHITTAKER.

“not be held bound for an unreasonable time; and, secondly, if the party with whom he contracted died with the interest in equity in him, the effect of that decision should make no difference between his representatives real and personal; for he was vested with a complete demand provided a good title could be made. *It would have been very different if Whittaker could never have had a good title from Sir Robert Mackreth*, for then it would have been very difficult to say, that as between the real and personal representatives the quantum of objection can possibly be material, if it amounts to so much of objection that the person they both represent could have said there was sufficient to authorise him to refuse to take the estate; and if the vendor could have said the vendee should take the estate, having an allowance out of the purchase-money, that gives a different turn to the argument.”

And again, pp. 613, 614, 615., Lord Eldon C. observes: —

“As far as *Whittaker v. Whittaker* contains any doctrine necessary to the decision, it is a decision which, taken with the doctrine connected with and necessary to determine it, proves no more than this, just the converse of the proposition I have stated, and equally prevailing in the case of heir or devisee. It is clear in both cases, that if a man contracts for a purchase, and the vendor has a good title by force of the contract, in equity it becomes his real estate; and, therefore, if he dies without a will it descends upon his heir; if with a will, his will containing words to pass it, his devisee will take; and either has a right to call for an application of the personal estate to the payment of the money. In *Whittaker v. Whittaker*, from the moment of the contract, (subject only to a question which it was admitted did not exist then, for the vendor could not make a title unquestionably,) *Whittaker* was owner of the estate in equity; and *Sir Robert Mackreth* of the price. One point, independent of any question about title, was, whether the vendor had not a right either to have the contract executed in a reasonable time or to be delivered from the obligation. Lord Kenyon decided, and was right in deciding, that the contract should be delivered up; but leaving undisturbed any question that could arise between the real and personal representatives; and there is no doubt, that if the real representative could then have said he was ready out of his own pocket to pay, the Court would have decreed him the estate, and have given him an equity afterwards to call upon the personal estate to reimburse him; and it is quite clear, that if the real representative had been an heir instead of a devisee, the question would have been just the same; for the title being good at the death of *Whittaker*, and no question between the parties to the contract during his life, the real estate in equity would have descended upon the heir; and there was a clear right in the party to leave the estate to descend as he thought proper.

“It is true there are many passages in the report of that case going much farther, and a considerable length to establish this; that the case of a devisee is to be distinguished from that of an heir; and that in the case of a devisee, it is to be understood that the vendee having the estate at the time of the decease in the sense in which he has it in equity though it fails, because ultimately he cannot have it, yet such a devise is to be understood as a direction, not only that the devisee shall take, but that if he cannot, the executors shall purchase another estate for that devisee. This doctrine is very important, and somewhat new; but when Lord Alvanley is represented to state it to that length it becomes me to doubt whether the inclination I feel to the contrary opinion is well founded.”

1792.

WHITTAKER  
against  
WHITTAKER.

ditions, and limitations as were thereinbefore mentioned, with respect to his said estates at *Sowerby, New-Church, and Totteridge* aforesaid.

In the same month of *January, 1782*, and before the contract was completed, and the remainder of the purchase-money paid (1192*l.* having been paid as a deposit) the testator died.

It was not discovered until some time after the testator's death, that he had made a will, and *Penelope Finey* (a defendant) had obtained administration in the Ecclesiastical Court, and possessed part of his personal estate; and afterwards, when the will was discovered, a suit was instituted in the Ecclesiastical Court, to revoke those letters of administration, and the probate of the will was granted to the executors, who were also the trustees named in the will.

[ \*32 ]

[\*] Two causes were afterwards instituted in this Court, concerning the testator's affairs; and among other matters referred to the Master, by order of the 27th *July, 1784*, one was to enquire whether the contract with *Mackreth* had been carried into execution.

The executors not being able to collect assets to carry the contract into execution, *Mackreth*, in *Easter* term, 1785, filed his bill against the executors of the testator, praying that the contract might be delivered up to him to be cancelled, on his paying 1192*l.* 10*s.* the deposit; and upon the hearing of that cause 10th *July, 1786*, it was referred to the Master, to compute interest on that sum, and that upon payment of that sum, (with interest, deducting the costs) the agreement should be cancelled; which decree was afterwards carried into execution.

In *Hilary* term 1790, the present supplemental bill was filed, by the plaintiff, *Abraham Whittaker*, stating the above case, and praying that directions might be given for raising the said sum of 7950*l.* and that the same might be laid out in lands, in the name of trustees, in trust, for such uses, in favour of the plaintiff, and with such remainders over as in the will are limited; or if the Court should be of opinion that the same should be considered as part of the residue of the testator's personal estate, then that the executors might be decreed to pay to the plaintiff, one moiety, according to the said will, &c.

The cause came on at the Rolls, during the Sittings after *Trinity* term, when it was argued for the plaintiff, by *Mr. Lloyd* and *Mr. Hollist*, that under the circumstances, and in the events which had happened, the money which was to have been paid for the lands contracted for ought to be now laid out in the purchase of other lands, to be settled to the same uses. On the part of the defendants, it was contended, by *Mr. Mitford* and *Mr. Sutton*, that the money should sink into the residue of the testator's personal estate, but his Honor in giving judgment went so fully into the argument, and the cases cited, that it is unnecessary to premise a statement of either.

This day his Honor gave judgment.

[ \*33 ]

[\*] *Master of the Rolls.*

This is a bill praying to have 7950*l.* laid out in the purchase of other lands, and settled to the same uses to which the lands contracted to be purchased were to be settled, and it arises on this clause in the testator's will, (stating the clause, as above stated.)

The testator has, by his will, devised these premises to *Abraham Whittaker*, in strict settlement; and has ordered another estate to be purchased and settled to the same uses.

At the death of the testator, his contract with *Mackreth*, for the purchase of the estate, was incomplete, part of the purchase-money had been paid, there was no objection on the part of the vendor to completing the purchase, there was no want of title; but the testator's affairs were complicated—his will was not found for some time after his death, and the vendor filed his bill against the executors, either to fulfil the

the contract or to abandon it. The testator died in 1782. In January, 1786, the cause came on—the executors declined completing the contract. The then Master of the Rolls [Sir L. Kenyon] decreed the contract to be at an end, and on payment of the deposit the contract was rescinded. In 1789 it appeared there were assets to enable the executors to pay the money.

1792.

WHITTAKER  
against  
WHITTAKER.

The question is, whether under these circumstances the devisees of the land contracted to be purchased, are entitled to have the money laid out in the purchase of other lands, to be settled to the same uses?

And I am clearly of opinion they are so entitled: and I am glad the industry of the gentlemen concerned for the residuary legatees, and the next of kin, (for they each contend against the devisees,) has not been able to find a case in their favour.

For the residuary legatees, it is contended, that as the purchase could not take place, they should have the benefit of it.

On the part of the next of kin, it is contended, that it did not pass to the residuary legatees.

[\*] It is, however, the same thing as to them, and I need not enter into the particular arguments, because I am of opinion, and upon sound grounds of decision, that devisees to whom a contracted estate is expressly given, are, if it fails, entitled to have the money which was to be paid for it, laid out for their benefit. (2)

[ \*34 ]

• This has been assimilated to the case of specific devises, where if the devise fails, the devisees are disappointed.

That is generally by the act of the testator; or if otherwise, the circumstance of ademption happening in his life-time he may rectify it, and not having done so, the devisee or legatee has therefore a right to nothing.

A specific legatee or devisee is not to abate, therefore must take his chance of obtaining the specific thing given.

If the contract had been put an end to in the life-time of the testator, it might *perhaps* have been a difficult thing for the devisees to be able to claim, I say *perhaps*, because I do not by any means admit that, even in *that* case, they could not.

It would have been difficult also for them to have made the claim, if the execution of the contract had been *prevented* in his life-time.

But the present case is different, and I cannot conceive it possible that the devisees for whom this was intended, should, by any act of other persons, be deprived of it.

At the death of the testator, *Mackreth* was compellable to complete his contract. (3) A defect of title in him would not have been decisive against the devisee (4): though it had become impossible for him to perform his contract, the devisee could not possibly be disappointed. This does not militate with the case of heirs at law, as to whom the testator has not expressed his intention: it only refers to devisees, who are pointed out by the testator. (5)

[\*] In this case, the vendor's being released from the contract, was only because he was tired of waiting for the executors to admit assets.

[ \*35 ]

It appears that there were, and are now, assets to pay this 7950*l.* and yet it is contended, that the devisees shall be deprived of the benefit intended them. A more monstrous doctrine cannot be supported in a court of justice.

(2) See, however, the references in note (1), *antea*.

(3) *Vide per* Lord Eldon C., 10 Ves. 614.

(4) *Vide* however *contra* in *Broome v. Monck*, 10 Ves. 597. *et seq.*, and note (1), *antea*.

(5) *Vide per* Lord Eldon C. *contra*, *ubi supra*, in note (1).



college could purchase no more advowsons, those already in their possession, were to be exchanged for others of greater value.

[\*] *Potter v. Potter*, 1 Vesey, 437., has no further operation on this case, than to shew that an estate contracted for, will pass under the word *estates*.

*Attorney General v. Day*, 1 Vesey, 218., shews, that the contract has changed the money into land.

*Green v. Smith*, 1 Atk. 572. I looked at the Register's book, which goes to the length of the words stated in the book, the Court would not direct the money to be paid to the personal representative. It is of the same date, 15th December, 1738. A. 265.

These are all the cases mentioned at the bar.

I mentioned one case, of *Lewis v. King*, (*ante*, vol. ii. p. 600.), which struck me as like the present.

The case of *The Earl of Coventry v. Coventry*, 2 Atk. 366., is very analogous; it supposes the exchange to become impossible, or the money to be left to purchase an estate in a county where it could not be procured, and says, then it must be laid out for the benefit of the devisee.

These *dicta* go a great way towards deciding this case.

I am of opinion, wherever a legatee or devisee is disappointed by events after the death of testator, he is entitled to compensation. Suppose the estate had been conveyed, and he had been evicted, or, suppose there had turned out to be a bad title, could the devisee lose the money that came from the purchase? Suppose the estate had been conveyed to the testator, and had passed by his will to the devisee, and then the devisee was evicted, could not he recover the purchase-money? (6)

Here the testator was bound to complete the purchase, *Mackreth* could have compelled him so to do. There was nothing to prevent the devisee from taking; but because the executors could not, or would not act, is he to be disappointed?

Therefore I am of opinion the devisee is entitled to have the money laid out in lands, to be settled according to the uses in the will. (7)

(6) "In *Mackenzie v. Robinson*, (mentioned in note to *Sedgwick v. Hargrove*, 2 Ves. 60.) a devisee of real estate was held entitled to the benefit of satisfaction made by a vendor to the testator for breach of covenant as to the title. See also *Lord Coventry v. Carey*, cited in same note." From the notes of Lord Redefdale.

(7) His Honor declared, "He was of opinion that the devisees of the real estate of the testator, *W. W.* contracted to be purchased by him from *R. M.* in the testator's will, named for the sum of 7950*l.*, are entitled to have the like sum of 7950*l.* raised out of the said testator's personal estate, and laid out in the purchase of other lands, to be settled to the like uses as the said estates so contracted for would have been conveyed, in case the said contracts had been carried into execution; and that the plaintiff *A. W.* was entitled to interest on the said sum, at the rate of 4 per cent. per annum, from the time of the death of the said testator." R. L.

[\*] CHITTY against PARKER.

(Reg. Lib. 1791. A. fol. 541.)

A LEGACY was given to a charity, and upon a bill for an account, &c. the *Attorney General* was not made a party.

Mr. Mitford said, that the Master would report that there was such a

out making the *Attorney General* a party. legacy,

1792.

Warrant  
against  
Warrant.

[\*37]

[\*38]

Lincoln's Inn  
Hall, 13th July.

Lords Com-  
missioners  
*Eyre, Ashurst,*  
and *Wilson*.

Practice.

Bill, where  
legacy to a  
charity, with-  
out making the *Attorney General* a party.

1892.

CHERRY.  
against  
FINCH.

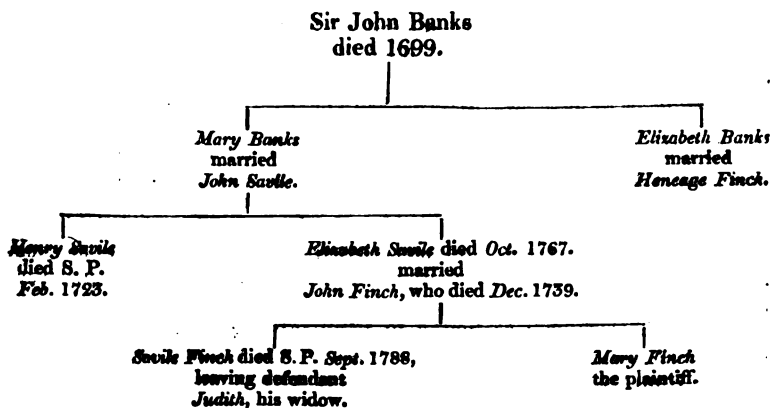
legacy, and that the parties might come in before him and claim: that this had been frequently done, since the questions upon the Mortmain acts had been nearly settled, without bringing the *Attorney General* before the Court; as it was found he would, otherwise, be a party in almost every cause.

It was referred to the Master to take the accounts.

[S. C. 1 Ves.  
jun. 534.]

### FINCH against FINCH.

(Reg. Lib: 1791. A. fol. 745. b.)



Lincoln's Inn  
Hall, 14th July.

A. agrees to assign lands to her son, he paying (int. at) 20,000*l.* to his sister, as a portion: she afterwards, by will, gives the sister 20,000*l.* charged on her real estates and then gives them, subject to that said

other charges to the son: the daughter takes but one sum of 20,000*l.* 2. Under a prior settlement, the daughter was entitled (subject to the son's estate tail) to an estate for life in certain of the premises which were in mortgage, on an assignment of the mortgage, the sister joined, and her charge of the 20,000*l.* was recited, but not her estate in remainder; this recital shall not hurt her title — but 3d. taking an interest under the brother's will, she must elect. (1)

[\*99]

(1) This case, amongst all the other material decisions on the point of election, is cited in Mr. Swanston's elaborate and useful note upon *Dillon v. Parker*, 1 vol. Rep. 334. to 409. *Vide etiam, Blake v. Bunbury*, *antea*, 21.

pointment,

pointment, in trust, for the first son of his daughter *Mary Savile*, that should live to attain twenty-one. And he devised other freehold estates to his daughter *Elizabeth Finch*, in tail, with cross remainder over to her sister.

Sir *John Banks* died in 1699, leaving his said two daughters his co-heiresses and devisees.

*John Savile* and *Mary* his wife died, leaving *Henry Savile* their only son and heir, who succeeded to a large estate in *Yorkshire*, from his father, which he left charged with a debt, afterwards liquidated at 16,379*l.*, and under the will of Sir *John Banks*, he became tenant in tail of the estates devised to his mother, but he suffered no recovery of these estates.

*Henry Savile* died without issue, in February, 1723, leaving *Elizabeth* his only sister and heir, who before had married *John Finch*.

By a settlement, made after marriage, 27th May, 1727, *John Finch*, in consideration of 16,000*l.*, which he received as a marriage portion with his wife, conveyed freehold estates in *Bolton*, *Nulton*, and *Iwade* in *Kent*, (now let at 346*l.* per annum,) to the use of himself for life, remainder to the use of his wife for life, remainder to the use of the first and other sons in tail, remainder to the use of the survivor of the said *John Finch* and *Elizabeth* his wife in fee.

*John Finch* died long since, leaving *Elizabeth* his widow and one son, *Savile Finch*, lately deceased, and one daughter, *Mary Finch*, now living and unmarried.

[\*] *Elizabeth Finch*, being tenant in tail of the estates devised to her mother by Sir *John Banks*'s will, suffered a recovery of the house in *Lincoln's Inn Fields*, and sold it, and in 1756, she suffered a recovery of the fee-farm rents in *Essex*, *Derby*, and *Stafford*, and mortgaged them for 10,000*l.*, but she suffered no recovery of the freehold estate.

*Elizabeth Finch* inherited from her brother Mr. *Savile*, the mansion house at *Thryberg* in *Yorkshire*, an estate at *Brinsworth* and *Rotherham* in *Yorkshire*, now let at 1070*l.* per annum, and other estates in *Yorkshire*, of the value of 1632*l.* per annum, and she purchased an estate at *Bramley* in *Yorkshire*, of the value of 155*l.* per annum.

By indentures of lease and release, 24th and 25th October, 1757, between said *Elizabeth Finch* of the first part; the earls of *Winchelsea* and *Aylesford* of the second part; *Savile Finch*, only son of *Elizabeth*, of the third part; and *Mary Finch*, only daughter of *Elizabeth*, of the fourth part; in consideration of the natural love and affection of *Elizabeth* and *Mary*, and for the preferment and advancement of *Savile*, and for settling the hereditaments after mentioned, *Elizabeth* granted to the two earls the lands and tithes in *Brinsworth* and *Rotherham* com. *York*, and the lands and hereditaments at *Iwade*, *Bobbing*, *Milton*, and *Newington* in *Kent*, (being the freehold lands in the settlement of 1727,) to the use of *Sarah Finch*, for life; remainder to trustees to preserve contingent remainders; remainder to the first and other sons of *Savile Finch*, in tail male; remainder to the daughters in tail male; remainder to *Mary Finch* for life, with remainders over to her first and other sons in tail; remainder to her daughters in tail; remainder to *Elizabeth Finch*, in fee; with powers to *Savile Finch* of jointuring and leasing.

By indentures of lease and release, 24th and 25th of July, 1758, the release being made between *Elizabeth Finch*, of the first part; *Savile Finch* and *Mary Finch* of the second part; and Lord *Middleton* of the third part; reciting a debt due from the estate of *Henry Savile* of 16,372*l.* 15*s.* 4*d.* to Lord *Pollington*, which had been advanced by Lord *Middleton*; in consideration of that sum paid by Lord *Middleton* to *Elizabeth Finch*, said *Elizabeth Finch* granted and released to Lord *Middleton*,

1708.

Finch  
against  
Finch.

[\*40]



1792.

Finch  
against  
Finch.

[\*41]

Memorandum,  
14th Apr. 1759.20,000*l.* to  
sisters.

*Middleton*, and *Savile* and *Mary* [\*] ratified and confirmed the manors of *Thrybergh* and *Deneby*, the manors of *Brinsworth*, and hereditaments at *Brinsworth* and *Rotherham*, and other places, with a proviso for redemption on payment by *Elizabeth Finch*, *Savile Finch*, or *Mary Finch*, of 17,000*l.* and interest, and with a covenant by *Elizabeth* and *Savile Finch*, that they would pay the 17,000*l.*

By a memorandum bearing date 14th April, 1759, between said *Elizabeth Finch* and *Savile* her son; *Elizabeth Finch*, in consideration of natural love and affection, agreed to convey to *Savile*, all the lands, &c., whereof she was possessed in the county of *York*, together with the household furniture, &c., he the said *Savile Finch* permitting her to have the use thereof at all times when she should come there, and also upon this further consideration, that the said *Savile Finch* shall pay to Lord *Middleton*, all such sums of money as she, *Elizabeth Finch*, is indebted to him; and upon this further consideration, that the said *Savile Finch* shall pay, or cause to be paid unto his sister *Mary Finch*, when and so soon as he shall be possessed of all and singular the estate of the said *Elizabeth Finch*, his mother, in *Kent*, the sum of 20,000*l.*, for, and as the fortune and portion of the said *Mary* his sister, and *Savile Finch* thereby agreed to pay the debt, and also to pay to his sister the said sum of 20,000*l.* for and as her fortune, and entered into further agreements immaterial to this cause; and it was further agreed between the parties, that the estate at *Bramley* should not be comprised in that agreement.

The 20,000*l.* was not paid to *Mary Finch*, during her mother's lifetime, and she was no party to this or the following agreement of 1st November, 1759, between Mrs. *Finch* and her son, whereby it was agreed, that Mrs. *Finch* should take to her own use, the rents and profits of all the estates agreed to be settled on *Savile Finch*, in the county of *York* (the estate at *Brinsworth* and *Rotherham* only excepted) on conditions therein named, but which are immaterial to this cause.

*Savile Finch* married Miss *Fullerton*, but there was no settlement on the marriage.

Will, 11th May,  
1764, 20,000*l.*

[\*42]

*Elizabeth Finch* made her will bearing date 11th May, 1764, and thereby, after directing her debts to be paid, (among other [\*] things) gave and bequeathed as follows, "unto my daughter *Mary Finch*, the full sum of 20,000*l.* as and for a fortune and advancement for her in life, to be paid to her within six months after my decease, together with interest for the same from the time of my death, at the rate of 4*l.* per cent. per annum:" and in a further part of the will was the following charge, "and I do hereby charge and make subject, not only all my personal estate, but also all and every my freehold manors, messuages, lands, tenements, tithes, hereditaments, and real estate whatsoever and wheresoever, with the payment of the said sum of 20,000*l.* and the interest thereof unto my daughter, and also with the said three several annuities (given in the intermediate part of the will) and subject to, and charged, and chargeable with such sum of 20,000*l.* and the interest thereof, (and other annuities,) I give, devise, and bequeath, all my freehold manors, messuages, lands, tenements, tithes, hereditaments, and real estate whatsoever and wheresoever, unto my son *Savile Finch*, his heirs and assigns for ever," and appointed *Savile Finch* sole executor of her said will.

*Elizabeth Finch* died on the 10th October, 1766.

By indentures of lease and release, 24th & 25th of January, 1769, between *Savile Finch* of the first part; *Mary Finch* (who was no party to the lease for a year) of the second part; Lord *Middleton* of the third part; and *William Sitwell* of the fourth part; reciting the mortgage to Lord *Middleton* that *Elizabeth Finch* was lately dead, and that *Savile Finch*,

*Finch, as the only son and heir at law of the said Elizabeth Finch, and also under the general devise in her will, was become entitled to the equity of redemption in the premises, subject and charged, together with the other estates of the said Elizabeth Finch, with the payment of 20,000*l.* to Mary, and reciting that there was due to Lord Middleton, for principal and interest, 18,020*l.*, and that Sitwell, at the request of Savile and Mary, had agreed to lend Savile 25,000*l.* on the security of the premises, and that Mary had consented and agreed to release the premises from the payment of the sum of 20,000*l.*, but nevertheless without prejudice to her right of claiming the same, and the interest thereof out of the other hereditaments charged with the payment thereof; in consideration of 18,020*l.* paid to Lord Middleton, and 6980*l.* to Savile Finch, Lord Middleton released, and Savile and Mary released and confirmed to Sitwell and his [\*] heirs, the premises comprised in the mortgage of July, 1758, to hold to Sitwell and his heirs, discharged of the 20,000*l.* to Mary, and interest, and of the proviso of redemption in Lord Middleton's mortgage, but subject to a proviso for redemption by Savile, upon payment of the mortgage money and interest. There was also a bond from Savile to Sitwell, for payment of the mortgage money and interest, and performance of covenants. And a bargain and sale was enrolled in Chancery, of the same date with the mortgage; Savile Finch and Judith his wife of the first part; Mary Finch of the second part; William Sitwell of the third part; covenant, that Savile, Judith his wife, and Mary, would levy a fine to Sitwell, of the premises: but which does not appear ever to have been levied. There was a further charge to Sitwell, by deeds of 2d July, 1772, for 5000*l.*, in which Mary joined, but the covenant for redemption was by Savile only; and another charge of 3000*l.* more, by indorsement in July, 1775, but Mary did not sign this indorsement, nor did she receive any of the money borrowed upon the mortgages, or any consideration for joining therein.*

The plaintiff Mary had been paid the 20,000*l.* given by the mother's will, in 1774.

*Savile Finch, by will dated 21st August, 1788, duly attested to pass real estates, gave several legacies and annuities, and, inter alia, gave to his sister Mary Finch one annuity or yearly sum of 200*l.* for and during her natural life, and subject to and charged with the payment of the legacies, annuities, and debts, he gave, devised, and bequeathed, all and every his real and personal estate whatsoever and wheresoever, and of what nature or kind soever the same might be, unto Judith his dear wife, her heirs, executors, and administrators, and appointed her sole executrix: and by a codicil dated 24th August following, over and above the 200*l.* a-year which he had given to his sister by the will, he further gave her the additional sum of 300*l.* a-year, payable in the same manner with the 200*l.* a-year, and ordered this to be added to, and make a part of his will: this codicil was attested by two witnesses only.*

*Savile Finch died 20th of September, 1788, three weeks after the date of the will, leaving the defendant Judith, his widow, but no issue.*

[\*] The widow having gotten possession under the will, and also having possession of the deeds and writings, the bill was filed, praying (among other things, which were either compromised or deserted at the hearing of the cause) an account of the rents and profits of the estates in Kent, and at Brinsworth and Rotheram, and that they might be paid to her; that 20,000*l.* with interest, from the death of Elizabeth Finch, might be paid to the plaintiff, out of the personal and real assets of said Elizabeth Finch, as a legacy given by her will, or else, as a debt due from Savile Finch, that the two annuities of 200*l.* and 300*l.* under the will and codicil of Savile Finch, might also be paid to her, and that the estates at Brinsworth and Rotheram might be exonerated.

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against  
Finch

[ \*43 ]

[ \*44 ]

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The questions at the hearing, which lasted several days, were reduced to three.

1st. As to the plaintiff's claim of a life estate in *Brinsworth* and *Rotheram*.

2d. As to her claim of two sums of 20,000*l.* each, one under the agreement between *Elizabeth Finch* and *Savile* her son, by the memorandum of the 14th of April, 1759, and the other under the will of her mother.

3d. A question of satisfaction arising from the two annuities given to the plaintiff by the will and codicil of her brother *Savile Finch*.

Mr. Attorney General, Mr. Richards, and Mr. Sutton for the plaintiff.

The first question is, upon the right of the plaintiff to the *Brinsworth* and *Rotheram* estate — *Savile Finch* having died without issue, the plaintiff's right under the settlement came immediately into possession. There can be no objection to her title, unless any thing arising from the mortgages can affect it. As to that, the instruments are such as to effect a mortgage upon the *Yorkshire* estates. They are all to raise money for the brother, and are his debts only, and not hers. In none of the instruments is the equity of redemption reserved to her; therefore, as between her and her brother, there is nothing to [\*] disappoint the limitations. So if a wife pledges her estate for the husband's debt, it continues his debt, and his effects are liable to it, *Tate v. Austin*, 1 Wms. 264.; *Bagot v. Oughton*, 1 Wms. 347. she has a right therefore to have the estate exonerated of the mortgage. The recital, that *Savile Finch* was entitled to the equity of redemption was a mistake; *Mary* was entitled to redemption, as far as it went to her life estate in remainder, and, if she executed that deed under a mistake, the Court will relieve her from the effects of that mistake.

2dly. As to her claim to the two sums of 20,000*l.* each, her claim to the first sum is under the agreement of 1759, by which the mother divested the *Yorkshire* estates out of herself, and the brother covenanted to pay to his sister 20,000*l.*, when he should come into possession of the *Kentish* estates, for her fortune. It is objected, she has been paid one sum of 20,000*l.* and has given a release for it, and that it is satisfied by the same sum being given: that where a party has entered into covenants, for valuable consideration, to pay a certain sum of money, and afterwards, by a will, gives the same sum without any expressions shewing that he intended an additional fortune, by the will he must be intended to have adverted to the obligation by the covenant; but here nothing was incumbent on Mrs. *Finch* with respect to her daughter *Mary*; it was all bounty, and argues that she did not mean to add to the former sum; they must argue on the other side, that, where she gave by her will 20,000*l.* to her daughter, she must have meant it as a gift, not to her daughter, but to her son, to whom she gave the estate, subject to the charge. Where there are gifts in two instruments, they must both operate, unless there is evidence to show the intention to be otherwise, *Goodfellow v. Burchett*, 2 Vern. 298.; *Devese v. Pontot*, (Mr. Finch's Pre. Ch. 240. n.) *Warren v. Warren*, (*ante*, vol. i. p. 305.) But this being a case of mere bounty is more like the case of legacies than that of portions, and in the case of legacies, where two sums are given in different instruments, they must both prevail, *Ridges v. Morrison*, (*ante*, vol. i. p. 389.) and *Hooley v. Hatton*, there cited in the note.

Mr. Solicitor General, Mr. Mansfield, Mr. Mitford, and Mr. Campbell, for the defendant.

[\*] The questions are reduced to three:

1. Whether the plaintiff is entitled to the *Brinsworth* and *Rotheram* estates?

2. A

2. A question arises out of this, Whether if entitled to the estates, she is to take them exonerated of the charge?

3. Whether she is entitled to two sums of 20,000*l.* each, or to one only?

The first and last of these questions depend on all the transactions.

Miss *Finch* must make out, that it was the intention of her mother that she should have the estates as well as the 20,000*l.*

If the plaintiff has any right, it must be under the voluntary settlement of 1759, by which *Elizabeth Finch*, in consideration of natural love and affection, agrees to assure to *Savile Finch* all her estates in *Yorkshire*, and the son agrees to pay off the mortgage debt, and to pay to his sister, when he should be in possession of the estate in *Kent*, 20,000*l.* for and as her fortune.

The *Brinsworth* and *Rotheram* estates were part of the *Yorkshire* estate which passed under this voluntary settlement. The second settlement only varies this as to the rents and profits. The question is, whether the *Brinsworth* and *Rotheram* estates were not within these agreements; and it seems to have been the intent of the parties that it was, and that Miss *Finch* was to receive 20,000*l.* for her interest in those estates. Then comes the will, whereby she charges and makes subject all the estates to the payment of 20,000*l.* as and for a fortune for her daughter, and directs it to be paid in six months after her decease; and among the enumeration of the estates which are subjected to the charge, are all her freehold manors, messuages, lands, tenements, *tithes*, and hereditaments whatsoever; now she had no *tithes* but in *Brinsworth* and *Rotheram*: and subject to the charges, she gives all her real estates to the son. She therefore intended he should take all the estates, upon paying the 20,000*l.* [\*] How is it possible then to argue, that giving it as a fortune, she meant this to be a second fortune? Suppose the whole effect of the first agreement not to be done away by the second, it cannot be conceived that Mrs. *Finch* meant, after having settled the *Brinsworth* and *Rotheram* estates, that Miss *Finch* should both take them and the 20,000*l.*; she might, if she chose to abide by the agreement, take either the 20,000*l.* or the estates, but that was the utmost; she could not take both. Then in 1766 Mrs. *Finch* died; the plaintiff was not then very young; the meaning of the family in the transaction was then very well known. The present bill was not filed till 1791, when the meaning of the parties was not so well known; but they had not been left in ignorance what it was.

Then as to the mortgage to *Sitwell*, it is certain that where two persons entitled to different interests in an estate, mortgage it to a third person, and the equity of redemption is reserved to one of them only, it may vary their interest. It is necessary for this purpose to look into the recitals of the deeds.

It is true that if a man mortgage his wife's estate, and reserve the equity of redemption to himself, he shall still continue seised *jure uxoris*; but, it is not so, if, by the recital, it appears that the intent of the parties is different.

The intention of the mother was, that Miss *Finch* should receive 20,000*l.* for her interest in *Brinsworth* and *Rotheram*, and that the son paying that sum, should take all the estates. She did receive 20,000*l.* and gave a release for it, and never thought of claiming the other 20,000*l.* till 1791.

She, by her intermediate acts, and by joining in the security, put a construction on the transaction, and has bound herself by a limitation for a valuable consideration: therefore, we submit she has no title to the *Brinsworth* and *Rotheram* estates.

If we are wrong in this point, the prayer of the bill, to have the estates exonerated,

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exonerated, is also wrong: the utmost claim she could have, would be for a *pro rata* contribution.

2. With respect to the two sums of 20,000*l.* all the cases turn on the intention of the parties. That of Mrs. *Finch* [\*] appears, from the transactions, to be clear. The principle is laid down in *Copley v. Copley*, 1 Wms. 147.

Mr. *Attorney General*, in reply.

The plaintiff is heir at law of a considerable family, who has no other provision but what she seeks by this bill.

There are two questions, —

1st. As to her claim to a life estate in *Brinsworth* and *Rotheram*.

2. As to her claim to the two sums of 20,000*l.* each.

As to the former, the question is, whether there is any indication, from the transactions, that her life estate, to which she is otherwise clearly entitled, is defeated. There is clearly no deed revoking that under which she claims, but it is said, that, from a variety of transactions, it is to be implied that she has desisted from her claims. But in the mortgage made in her mother's life-time, the equity of redemption is reserved to the plaintiff as well as the mother and *Savile Finch*; in the deeds after the mother's death, the equity is indeed reserved to *Savile Finch*; but a mistaken recital, that he was entitled to the equity of redemption, will not alter her estate. Then with respect to the two agreements between the mother and son, the plaintiff, not being a party, cannot be bound by them. But it is said she is bound by the deed of mortgage to *Sitwell*, and that she has raised an equity against herself by her non-claim, and by permitting the equity of redemption to be reserved to *Savile Finch*: but she knew nothing of the reservation of the equity of redemption, but left it to her brother's solicitor. She was doing a kindness to her brother, by postponing her own 20,000*l.*: her claim to the life-estate in *Brinsworth* and *Rotheram* never arose till after the death of *Savile Finch*, yet under these circumstances it is argued, that the deed of 1757 is to be overturned. Then as to the deed of 1759, *Brinsworth* and *Rotheram* could not be included, *Savile Finch* being already in possession of those estates; so that there can be no inference, from any of the transactions, that she gave up her interest. Then the gift of the estate by *Savile Finch*, to his widow, being a general gift of it, includes [\*] *Brinsworth* and *Rotheram* which were the property of *Mary*, the plaintiff; *Judith* the defendant cannot, under the cases of *Noyes v. Mordaunt*, 2 Vern. 581. and *Streatfield v. Streatfield*, take that, and also take under *Savile's* will.

[\*49]

The real point is, as to the sums of 20,000*l.* This has been variously treated, as a case of double portions—and—as appearing from the transactions that she was not to have both.

The cases, especially *Copley v. Copley*, are all different from this, they are cases where the child is a purchaser of the first obligation, and that obligation personal as to the party making the second gift: and as that doctrine has been treated, it may be reasonably presumed, that the party in making the second gift looked to and meant to discharge the previous obligation.

At the time that *Elizabeth Finch* was giving to her son a considerable estate, she lays him under an obligation to give his sister a portion; but she was under no obligation to provide any sum as a portion for *Mary*, who was not a purchaser under any deed executed by her. Shifting an obligation to another person (where there is one) and even encreasing it, does not operate as a satisfaction, *Hanbury v. Hanbury*, (*ante*, vol. ii. p. 529.) A little matter will serve to rebut the presumption arising from a similarity of sums, or the one being greater than the other.

It is said that the will is an execution of the deed of 1759, that was executed, *Saville* having come into possession; and *Mary's* claim to the 20,000*l.* had been recognised by all the mortgages down to the time of his death.

The Court this day gave judgment.

Lord Commissioner *Eyre*. (2)

[\*] This cause was, in its outset, so involved and entangled in the transactions of more than a century, that even Mr. *Attorney General's* very clear and distinct manner of stating the case, hardly made it intelligible: but the discussion which it has undergone, has cleared away a great part of the confusion which had overspread it, and we now see the case reduced to its true merits, and these lying within a very narrow compass.

There are two principal questions: first, Whether the plaintiff is entitled to a further sum of 20,000*l.* over and above the 20,000*l.* devised to her by her mother, and charged by her upon the estates devised to her son *Saville Finch*? And secondly, Whether the plaintiff is entitled to a life-estate in the lands in *Brinsworth* and *Rotheram*, part of the *Yorkshire* estate belonging to this family?

The second question, if it should be determined in favour of the plaintiff, will raise a subordinate question, viz. Whether the plaintiff is entitled to have her life-estate in those lands, exonerated from the whole, or from any part of the mortgage debt of 17,000*l.* — 5000*l.* — and 3000*l.* to which these lands, together with other lands comprised in the mortgage deeds, are at present liable.

The first of these questions required nothing more for the solution of it, than that the facts should be distinctly seen and understood. Those which bear upon this point are very few: In the year 1759, Mrs. *Elizabeth Finch*, who had, in the year 1757, made a settlement of her estates at *Brinsworth* and *Rotheram*, part of her *Yorkshire* estate, upon her son for life, with remainder to his issue in tail, with remainder to the present plaintiff for her life; and having probably delivered up the possession of those estates to her son; was disposed to give up to him the rest of her *Yorkshire* estates: and she entered into an agreement with him, by which she undertook to convey to him the estate and family house at *Thirburgh*, and all the rest of the estate of which she was then possessed, and to deliver up to [\*] him the actual possession, upon certain terms and conditions not necessary to be particularly mentioned, and upon this stipulation, which has given occasion to this first question, viz. That her son should pay to the plaintiff, *Mary*, a sum of 20,000*l.* as soon as he should come into possession, upon her death, of her *Kentish* estates.

There was a reservation, upon which nothing turns, by a sort of postscript to this agreement, to Mrs. *Finch*, of a part of the *Yorkshire* estate called *Bramley*, and there was a subsequent agreement, upon which nothing turns as to this question, regulating the time and manner of her son's taking possession of these estates.

We may collect, that the son was actually put into possession of the estates under these agreements, no conveyance appears to have been made, and probably there was no conveyance in pursuance of the agreement.

Matters rested thus till the death of Mrs. *Finch*. By her will, she devises all her estates, in general words, to her son *Saville Finch*, and bequeaths 20,000*l.* to the plaintiff her daughter, and charges all her estates devised to her son, with that sum of 20,000*l.*; that sum, after her death, was paid, and the plaintiff executed a release to Mr. *Saville*

(2) See the decree from Reg. Lib. at the end of the case, *postea*, 54.

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*Finch* of the sum of 20,000*l.* to which she was entitled under the will of her mother, taking no notice of, and probably not being then apprized of any claim she might have to another sum of 20,000*l.* under the agreement of 1759.

It does not appear when *Mrs. Mary Finch*, the plaintiff, was first informed of the existence of that agreement of 1759, without which, the weight of the argument drawn from her acquiescence in the receipt of one sum of 20,000*l.* cannot be ascertained. To consider this lady's claim in a light the most favourable for her, I will suppose it recently made, that is, soon after the death of her mother; a very weighty observation was made by *Mr. Mansfield* upon the effect and operation of the agreement of 1759, that the plaintiff was neither party nor privy to that agreement, her [\*] mother might at any time have released it, and perhaps might have prevented its ever taking effect, by suffering a recovery of the *Kentish* estates, and disposing of them by her will. After the death of the mother (and taking it for granted that the condition, upon which this sum of 20,000*l.* was to be paid to her daughter, was performed,) that is, that the *Kentish* estates were come to the possession of the son, upon the death of his mother, still the daughter had no remedy, at law, to enforce the payment of this sum of 20,000*l.*, and it appears to me to be very questionable, how far the daughter, as against the son (party to the agreement) and as executor of the mother (the other party to the agreement) she herself being a stranger to it, could, even in a court of equity, have compelled the payment of this money to herself; and that it would be difficult to say out of what fund it should be raised.

If a court of equity would have compelled the payment of it, it would have been because it was intended by the mother for a provision, and because it was the only provision for a daughter, and because it was reasonable to presume that the mother having done nothing in her life-time to alter or release the agreement, had, in effect, given to her daughter this sum of 20,000*l.*; possibly, upon these grounds, a court of equity might raise a trust for the daughter, of the benefit of this agreement upon the possession or estate of the son.

An express devise of 20,000*l.* to the daughter, for the express purpose, and in the name of portion, fortune, or advancement, at once destroys every argument and every pretence which a court of equity could lay hold of for raising any sum under the agreement; and when we consider, that both the sum and the object are precisely the same, these circumstances afford strong grounds for collecting an intent in the mother, that her daughter should not take any benefit under the agreement.

[ \*49 ]

It was observed by Lord Commissioner *Wilson*, that the will (though it has no *express* reference to the agreement, yet being referred to the agreement, and the fact taken into [\*] consideration of no conveyance having been executed in the mother's life-time) was to be considered *pro tanto* as an execution of the agreement. In this way of considering the subject, the 20,000*l.* in the agreement, and the 20,000*l.* in the will are one and the same 20,000*l.* which goes to the very root of this claim and destroys it utterly.

The second question is, Whether this plaintiff is entitled to a life-estate, in the lands of *Brinsworth* and *Rotherham*? Under the settlement of 1757, she must be taken to be *prima facie* entitled. The reservation of the equity of redemption to her, by the deed of 1758 requires this. It occurred to me, upon the first view of the subject, that it might admit of a question, whether the plaintiff having accepted the benefit of the gift to her by her mother of 20,000*l.* by her will, could now insist upon her claim to a life-estate in these lands: this would

would depend not upon the question, whether Mrs. Mary Finch has waived her claim, but upon a question of fact whether the mother had taken upon herself to make a disposition of the whole estate in these lands (consequently including this life-estate) by the agreement of 1759, or by her will, or both taken together, considering the will as an execution of the agreement. But, upon further consideration, I do not see, distinctly, such a disposition made by the mother in any of these instruments. Great stress was laid, in the argument, upon the exception in the second agreement, as affording evidence of the mother's intent to convey these lands, as well as the other parts of the *Yorkshire* estate to her son, and to put these lands, as well as the rest of the estate, into his possession; but I doubt this is too much to conclude from an exception of this nature, which is very easily accounted for, in the particular case, by attributing it to caution, and perhaps anxiety to prevent the agreement about the rents and profits up to a certain time, of estates then lately delivered up, or to be then delivered up to the son, from being extended to lands which, though part of the *Yorkshire* estates, were no part of the objects of the agreement, stood upon a different title, and probably were in the son's possession, long before the agreement of 1759 was entered into.

[\*] I am, therefore, strongly inclined to be of opinion, that the plaintiff is at liberty to insist upon her claim to her life-estate in these lands of *Brinsworth* and *Rotheram*, notwithstanding her acceptance of 20,000*l.* under the will of her mother.

But there is still another difficulty in the way of this claim, suggested by Mr. *Misford*, which deserves consideration.

The plaintiff takes a benefit under the will of her brother also: she has an annuity of 200*l.* a-year under his will, and 300*l.* a-year under his codicil. If her brother has taken upon himself to make a disposition of these lands, the plaintiff will be put to her election, whether she will take under the settlement, or under the will. The brother has not devised these lands *by name*, but he has devised *all* his lands, and he was in possession of these lands. His true title was as tenant for life, under the settlement of 1757; but there is strong evidence that he and his sister considered him as having the fee-simple in him, either as heir at law, or as devisee of his mother; as between them, therefore, his intent to devise these lands, together with the rest of his estate, to which he was entitled in fee-simple, as heir at law, or as devisee of his mother, can hardly admit of a doubt.

That both the brother and the sister considered him as the owner of the fee-simple of these lands of *Brinsworth* and *Rotheram*, is made out by this deduction. These lands were included with the *Yorkshire* and other estates, in the mortgage in 1758 to Lord *Middleton*, in which the plaintiff joined. In the assignment of that mortgage to Mr. *Sitwell*, in which the plaintiff joined, there is a recital that the mortgaged premises were devised by Mrs. *Elizabeth Finch* to the brother in fee-simple, subject to a charge of 20,000*l.* in favour of the plaintiff, which had been satisfied: from this time, when by a solemn act, the brother and sister concurred in declaring that these lands of *Brinsworth* and *Rotheram*, as part of the mortgaged premises, were the inheritance of the brother, there are no traces of any recognition, either by the brother or by [\*] the sister, of the settlement of 1757, under which she is now to claim this life-estate; a settlement which, it has been truly observed, was originally voluntary, had been broke in upon by the mortgage of 1758, was become an object but of little consequence, there being no issue of the brother or of the sister to take under it, and the sister's interest probably supposed, both by the brother and sister, to have been very well compensated for by the mother's bequest of 20,000*l.*

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[ \* \*50 ]

[ \* \*51 ]



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This train of circumstances, though they do not constitute any legal or equitable bar to this claim of a life estate, though, perhaps, in the distressed state of this lady's circumstances, as opposed to the opulence of Mrs. *Judith Finch*, may make a claim at this day not very harsh, but it does yet apply very strongly to the point to which it is adduced, namely, to shew that the brother considered the estate as his, and meant to pass it by his will, which, as I have before observed, will put the plaintiff to her election; and, if she should elect to take under the will, she then must release this claim, and the secondary question of exoneration in that case will not arise. If it is to be made, we have already intimated our opinions, that, in respect of so much of the mortgage debt as was applied to satisfy Lord *Pollington's* claim upon the real assets of *John Saville*, there ought to be no exoneration; and that, as to further sums borrowed for the accommodation of Mrs. *Elizabeth Finch*, and of *Savile Finch*, as well those in the security for which the plaintiff joined, as that in which the plaintiff did not join, she will have her interest exonerated from the mortgage debt; and she will also be entitled to have the proportion of the interest of the mortgage debt, which is to remain upon her estate ascertained, and a provision made, by the decree of this Court, that the residue of the interest may be kept down by those who have the equity of redemption of the rest of the mortgaged premises.

[ \* \* 52 ] In the event of the plaintiff's being put to an election, and her electing to take under the will, she will be to convey her life-estate as the Master shall direct; and as to the [\*] rest of her bill, it will be to be dismissed, as to so much of it as seeks to impeach any of the transactions in this family upon the ground of fraud, with costs; and as to the rest, the plaintiff's circumstances considered, perhaps, without costs.

Lord Commissioner *Ashhurst*.

The first question is, whether the plaintiff is entitled to take both the sums. The second, whether she is entitled to the possession of the estates.

As to the first, I think she is entitled to only one sum. The cases upon subjects of this kind are not very useful, as the question depends on the intention, which must be gathered from all the circumstances of each particular case. The present is very pregnant in circumstances to shew that Mrs. *Finch* only intended one sum.

In 1759 she gives up her estates on conditions; this rested entirely on agreement, and never was carried into execution by conveyances. That not having been done, she executes it by her will. The will is only a completion of the act; and as there could be no covenant by the brother to pay the sum, she secures the payment of it by the will.

The sum is specifically the same, and given for the same purpose, so that it is altogether only doing the same thing by a different mode.

The plaintiff has given judgment against herself, by never claiming till she filed her bill.

[ \* 53 ] As to the second question, it is by no means clear that the 20,000*l.* was not meant as a compensation. The life-estate in [\*] *Brinsworth* and *Rotheram*, upon failure of the brother's issue, were no present provision.

But this was not *ejusdem generis* with the 20,000*l.*; and although it is a handsome provision, yet, on the other hand, it is not clear she meant to deprive her of the other. But there is another ground on which the plaintiff must be driven to make her election. If she takes under the will of *Savile Finch*, she must not contravene it; as, by the mortgage to *Sitwell*, she encouraged the mistake as to *Savile's* title. If she had claimed, he might have suffered a recovery, therefore I think she must be driven to her election.

Lord

Lord Commissioner *Wilson*.

I think the mother intended the daughter to take only one sum of 20,000*l*.

The objection is, that the gift of the first 20,000*l*. is by way of charge, and that the other is given by the will, and that the former is a compensation for the *Kentish* estate.

By the mortgage of 1769, the 20,000*l*. is recited to be a charge by the will of the mother. If *Mary Finch* knew of her charge by the agreement, she was satisfied that only one sum was intended. If both had been known to have been intended, both would have been recited in that deed. Then it is said, that, unless the second sum is additional, that the mother gave nothing to the daughter, but, by the will, was giving only to the son; and the argument is this, that if the mother had not made the will, still the daughter would have taken the 20,000*l*. But so it is in all cases where the first sum is an obligation. The agreement and will together shew it was intended only as one sum of 20,000*l*. to be paid to the daughter *as and for a portion or fortune*. The agreement not being completed, the mother, by her will, takes care that her daughter should have the 20,000*l*.

As to the other question, it depends on the settlement of 1757; under that she was entitled to an estate for life, subject to the estate of the son. The first mortgage does not disturb that settlement.

[\*] In 1758 an additional charge was made; the mortgage made then was for 17,000*l*.; there was no reason for *Savile* or *Mary* joining in that mortgage, but on account of their interests under the settlement of 1757.

In 1759, the mother agrees to assure to *Savile* all her estates in *Yorkshire*. The words added were to avoid a general description. If so, that deed is a recognition of the former settlement.

Then there is nothing prior to the will of *Elizabeth Finch*, to shew that either she, *Savile*, or *Mary*, thought the settlement of 1757 at an end.

There is nothing in the will to take away *Mary's* right: the will is quite general.

Then the mortgage of 1769, by the recital, shews that *Savile Finch* thought the whole of the estate belonged to him, subject to no charge but the mortgage and the 20,000*l*. That recital was drawn without premises to warrant it.

There was no circumstance prior to 1769 to revoke the settlement of 1757. If so, it was a mistake in the recital, and I should be rather inclined to think that there had been an idea in the family, that the plaintiff was only to take 20,000*l*. but they had not provided for it by legal means.

In 1769 there was an additional mortgage; *Mary* was a party to that, because the charge still subsisted. But in the indorsement, in 1775, she was no party, having been then paid.

The idea then was, that the settlement was at an end.

But as to what she takes under the will of *Savile*,

It was understood by the family that the estates were his, and wherever estates are considered as belonging to *A.*, and *A.* gives all his estates by will, any party who takes under the will must elect. (3)

(3) The decree is entered R. L. 1791. A. fol. 751., and is as follows:—

" Their Lordships do order, that so much of the plaintiff's bill as seeks to compel the defendant *Judith Finch* to elect whether she will take under the will of the testator *Savile Finch*, her late husband, and relinquish all claims of dower, and as seeks to compel payment of 20,000*l*. with interest, from the death of *Elizabeth Finch*, and as seeks to have the estates at *Bramley* delivered up to the plaintiff, and as seeks to have an allowance for such sums of money as the plaintiff hath laid out and expended in repairs in

1792.

FINCH  
against  
FINCH.

[\*54]

1792.

Finch  
against  
Finch.

the improvements of such estate with interest, stand dismissed out of this court without costs. And as to so much of the plaintiff's bill as seeks to impeach the purchase made by the said testator *Savile Finch* of 500*l.* a-year, part of the annuity of 750*l.*, in the pleadings mentioned as a breach of trust, and as having been obtained by fraud, and for an inadequate consideration, it is ordered that the same do stand dismissed out of this court with costs, to be taxed by Mr. *Leeds*, one of the Masters of this court. And it is ordered and decreed, that the said Master do take an account of the rents and profits of such parts of the estates in *Romney Marsh*, the *Isle of Thanet*, *Milton*, *Twede*, *Bobbin*, and *Newington* in the pleadings mentioned, as are freehold of inheritance, accrued since the death of the said testator *Savile Finch*, received by the defendant *Judith Finch*, or by any other person or persons by her order or for her use. And in taking the said account, it is ordered that the said defendant *Judith Finch* be at liberty to retain one third part of the rents of the said estates in *Romney Marsh* and the *Isle of Thanet*, out of which she is entitled to dower to her own use. And that she be likewise at liberty to retain out of the remaining two-thirds of such rents and profits, and out of what shall be found due from her for the rents and profits of the other estates, what shall be taxed for her costs, under the directions before given. And it is ordered, that the said defendant *Judith Finch* do pay the remainder of such rents and profits, after the aforesaid deduction, to the plaintiff. And their Lordships do declare, that the plaintiff ought to make her election, whether she will take the life estate in the estates in *Brinsworth* and *Rotherham*, to which she is entitled under the settlement dated the 25th of *October*, 1757, in the pleadings mentioned, or abide by the will of the said testator *Savile Finch*. And in case of electing to take under the said settlement, do also declare that the plaintiff will be entitled for her life to the rents and profits of the said estates at *Brinsworth* and *Rotherham*, subject to the payment thereof of a proportion of the interest of the principal sum of 16,372*l.* 15*s.* 4*d.* charged thereon by the indentures of the 24th & 25th of *July*, 1758, in the pleadings mentioned; and that the said Master do ascertain what such proportion ought to be. And it is ordered that the said Master do take an account of the rents and profits of the said estates at *Brinsworth* and *Rotherham*, accrued since the death of the said testator *Savile Finch*, received by the said defendant *Judith Finch*, or by any other person by her order or for her use. And that the said Master do take an account of the several sums which have been received by the plaintiff, or by any other person or persons by her order or for her use, for and in respect of the annuities of 500*l.* and 200*l.* given to her by the will and codicil of the said testator *Savile Finch*. And that what the said Master shall find to have been so received, for and on account of the said two annuities, be deducted out of what shall be found due from the said defendant *Judith Finch*, for the rents and profits of the said estates at *Brinsworth* and *Rotherham*. And it is further ordered, that the remainder of such rents and profits, subject to the payment of what the said Master shall find to be the proportion of interest on the said sum of 16,372*l.* 15*s.* 4*d.* to be borne by the said plaintiff, be paid to the said plaintiff for her own use." R. L.

[\*55]

*Lincoln's Inn*  
*Hall*, 13th *July*.  
Lords Com-  
missioners  
*Eyre*, *Ashurst*,  
and *Wilson*.

Gift by will of a specific sum among the six children of *A.*, *A.* had six children at the time, one more was born after the testator's will, but before the codicils, she shall not take a share with the six born before.

The testator gave the residue to his relations named in the will. He made a codicil which he directed to be taken as part of his will; and a second by which he gave legacies but gave no such direction; in this codicil, there were legacies given to two of his relations, they shall take shares of the residue.

[\*] *SHERER against BISHOP.*

(Reg. Lib. 1791. B. fol. 380.)

*NICHOLAS FAYTING*, clerk, made his will, dated 1st *Feb.* 1787, and thereby after several legacies, and among others one of 100*l.* to *William Fayting*, son of his late brother *Joseph Fayting*; he gave 3000*l.* reduced Bank consolidated annuities to be equally transferred and divided between the six children of *John Sherer*, and *Mary* his wife, each child's share to be transferred to him or her at twenty-one; and in case of the decease of any of them before attaining such age, then his, her, or their shares, to be equally transferred among the survivors at twenty-one, and if all should die except one, then the whole to such survivor; and in case of the death of all, then the whole to be transferred to *Mary Sherer* the mother; and in case of her decease, then he gave the same to his

executors equally; and he directed the dividends to be applied for the maintenance and education of the children; and he gave to *Mary Sherer* 1000*l.* for her sole and separate use; and he gave all the rest and residue of his estate and effects to his executors on trust, to divide the same to and amongst such of his *relations only as were mentioned in that his will*, in such proportions as they shall think fit, particular regard being paid to those of the family who should be thought, in their opinion, the poorest in circumstances, and the most unblemished in their characters.

The testator made two codicils to his will, the latter of which bore date 11th of *December*, 1788, in the close of which he expressed himself as follows, "And whereas I have not taken any notice of the two surviving children of *William Fayting*, son of my late brother *Joseph Fayting*, in my said will or codicil above mentioned, I do now leave to each of them the sum of 200*l.* to be paid to them by my executors, as each of them shall attain their respective age of twenty-one years; but if either of them shall die before they shall arrive at the said age of twenty-one, then the survivor of them shall have the whole 400*l.* and should they both die before they should attain the age of twenty-one, then the said 400*l.* shall be divided between my executors, share and share alike.

[\*] The bill was filed by the six surviving children of *John* and *Mary Sherer*, against the executors of the testator *William Fayting*, the legatee of the 100*l.*, *George Thomas Fayting* and *Ann Fayting* (his children), *John Sherer* and *Mary* his wife, (the father and mother of the plaintiffs,) praying an account of the testator's personal estate, and that the same shall be applied in payment of his debts, &c. and the clear residue might be ascertained, and equally divided among such persons, as in the judgment of the Court shall be entitled thereto, under the said will and codicil, and that the specific legacy of 3000*l.* reduced Bank annuities, might be transferred to the Accountant General to the credit of the cause, and subject to the contingencies in the will mentioned, and that the plaintiffs' shares of the residue, should be ascertained and secured for their benefit, and that, out of the interest thereof, proper allowances might be made for their maintenance, during their respective minorities.

The defendants the executors, by their answer stated the will and codicils which they had proved, and possessed themselves of the personal estate of the testator, much more than sufficient to pay debts, funeral expences and legacies, and that the plaintiffs are the six children of *John* and *Mary Sherer*, and entitled, as such, to the 3000*l.* reduced Bank annuities, subject to the contingencies of the will, and that they are ready to transfer the 3000*l.* to the Accountant General as prayed; and that they believed the plaintiffs are related to the testator; that they had appropriated the legacies given to the infant legatees, and in particular of the infant children of *William Fayting*; and that many persons having set up claims to the residue, of which they could not judge, they had not been able to make distribution of such residue, but were ready so to do among such persons as the Court should direct.

The defendants *William Fayting* and his two children, by their answer, stated that *William Fayting* had received his legacy, and the two children claimed the legacies under the codicil; and *William Fayting*, as nephew of the testator, and the two children as first cousins of the testator claimed to be entitled to a share of the residue, and that, although not particularly named in the will, yet being described in the last codicil, and the [\*] codicil being to be taken as part of the will, such description was equivalent to their being particularly named.

The other defendants claimed, by shewing their relationship to the testator, shares of the residue, and some of them claimed in the same

1792.

Sherer  
against  
Bisnor.

[ \*56 ]

[ \*57 ]

1792.

Sutton  
against  
Benson?

why with the *Faytings*, as being named in one or other of the codicils, though not named in the will.

At the hearing 10th of February, 1791, it was referred to the Master to take the usual accounts; and it was ordered that the legacy of 3000*l.* should be transferred by the executors to the Accountant General in trust in the cause, subject to the further order of the Court; the children, when they should become entitled thereto, to be at liberty to apply; and the Master was to enquire what children of *John Sherer* and *Mary* his wife were living at the death of the testator, when they were respectively born, and whether all, or which of them were living; and it was ordered that the Master should enquire whether *John Sherer* was in circumstances to maintain his children suitable to their fortune, and if not, that he should enquire what was proper to be allowed for their maintenance: and it was ordered, that the residue of the personal estate should be paid into the Bank, and that the Master should enquire what persons named in the testator's will, are relations of the said testator; and also enquire into the circumstances and character of such relations, and state the same to the Court; and also state to the Court, but without prejudice, the circumstances and character with regard to those relations named in the codicils to the said testator's will respectively.

January 22d, 1792, the Master made his report, in which he stated the personal estate, and the application thereof; and he found (*inter alia*) that at the time of the death of the testator, (which happened on the 22d of February, 1789,) the said *John Sherer* had seven children living by his wife, that is to say, the plaintiffs and *Emily Sherer*; he then stated the births of each, by which it appeared that the six plaintiffs were born before the making of the will, and *Emily Sherer* on the 18th of November, 1782, subsequent to the date of the will, but prior to either of the codicils: and he found that all the said [\*] seven children were then living; that he found *John Sherer* was not in circumstances to maintain his children suitable to their fortunes, and was of opinion that 15*l.* was proper to be allowed for the maintenance and education of each of the six plaintiffs. He then stated the relationship and respective circumstances of the persons who claim as relations of the testator, and who were mentioned in the will or codicils of the testator, and the state of the residue of the testator's personal estate.

The cause came on 20th of June last, but it then appearing that the defendant *William Fayting* had died between the decree pronounced and the report, and his interest in the residue being considered (although uncertain as to the amount) as vested, it was held necessary for the cause to stand over till the first day of causes after term, with liberty to revive against his personal representative in the mean time: and *Sarah Fayting* his widow and administratrix was made a defendant to the suit.

And it coming on again this day,

Mr. *Lloyd* and Mr. *Mitford* for the plaintiffs, stated that there were two questions.

1st. Whether *Emily Sherer*, who was born after the will made, but before the codicils, should take a share with her brothers and sisters in the 3000*l.* given to the children of *John* and *Mary Sherer*.

2d. Whether *Thomas* and *Ann Sherer* (who were referred to in the codicil, but not named in the will,) should take shares of the residue.

As to the first, the gift of the 3000*l.* to the six children, is the same as if the testator had named them. It cannot include *Emily* who was born after. If he had meant to include her, he had an opportunity of doing it in the codicil.

With respect to the residue, it is given to such of his relations as are named in the will. Here it is the same as if he had named them over again; the *Faytings* (the infants) are not [\*] named in the will: in the codicil

[ \*58 ]

[ \*59 ]

codicil he says, Whereas I have not taken notice of them in the will, I give them 200*l.* each. But it will be said that the codicil, being directed to be taken as part of the will, must be considered as incorporated with it. To many purposes it is so, but not to all. Where an estate is given by will to *A.* and the heirs of his body, *A.* dies, and then the testator makes a codicil, by which he confirms the will; this will not carry the estate to the heir of the body of *A.* because the testator meant to give to *A.* for life, which now cannot be. Where a man gives all his estates, and afterwards purchases other lands, and then makes a codicil re-publishing the will, it carries the land, because the words of the will are sufficient for the purpose. Here the words are not sufficient, unless the word *will* is considered as equivalent to *will* and *codicils*. In *Hove v. Medcraft* (*ante* vol. i. p. 261.) the subsequent legacies were not to be charged on the land, because only those under the *videlicet* were so charged.

Mr. Solicitor General, for *Emily Sherer*.

If *Emily Sherer* had been living at the time the will was made, there could not have been a doubt, though the number mentioned (six) were wrong.

Lord Commissioner Eyre.—There are so many cases that tie up the operation of wills to their dates, that I cannot determine against them.

Mr. Hollist for *Thomas* and *Ann Fayting*.

The first codicil is directed to be taken as part of the will: how can this be, without considering the second as part of it also, where legacies are given without such a direction? He there says, Whereas I have in my will taken no notice of the children of *William Fayting*, therefore I give them 200*l.* each. He seems to think his not mentioning them, an omission in the will, which he meant to cure by the mention in the codicil; the Court therefore will construe it as if he had made the disposition.

[\*] Lord Commissioner Eyre said, that every codicil was a part of the testamentary disposition, though not part of the instrument; and, upon this ground thought that *Thomas* and *Ann Fayting* were entitled to a share of the residue.

The other Lords Commissioners hesitated a good deal at this extension of the word *will*, and doubting the construction,

Lord Commissioner Eyre said he adhered to his first opinion. And a decree was pronounced in their favour.

1795:1

Sumner?  
against  
Beamer?

[ \*60 ]

LAW and Others Executors of Sir THOMAS RUMBOLD, deceased,  
against RIGBY (1) and Others, and the ATTORNEY GENERAL.

(No entry.)

THE plaintiffs filed this bill on behalf of themselves and the other specialty creditors of the late Right Honourable *Richard Rigby*, against his devisees and acting executor, and thereby stated that the late Sir *Thomas Rumbold*, their testator, 1st of September, 1784, lent the

being such as would not be effective, and the present bill making new parties.

Lincoln's Inn  
Hall, 16th July.

Lords Com-  
missioners  
Eyre and  
Ashburn.

Demurrer of  
another cause  
depending  
over-ruled (2),  
the cause de-  
pending

(1) See this cause in a subsequent stage, A. D. 1795, 2 Cox, Ca. Ch. 415.

(2) As to such objections in general, of another cause depending, see Mr. Beamer's El. Pl. Eq. 134. 140.

said

1792.

LAW  
against  
RIGBY.

said *Richard Rigby* 59,000*l.*, which sum, and the interest thereon, was secured by a bond in the penalty of 118,000*l.*; it further stated the death of the said *Richard Rigby* in 1788, and that, at the time of his death, there remained due upon the said bond 50,047*l.* 5*s.* 9*d.* with an arrear of interest from the 1st of *September*, 1787:

That the said *Richard Rigby* previous to his decease, being seised and possessed of considerable real and personal estate, made his will, dated 30th of *December*, 1781, and thereby, after several legacies, gave to the defendant *Pichard* an annuity of 100*l.*, and appointed *Timothy Caswell Esq.* and the defendants *Macnamara* and *Francis Hale* (now *Rigby*) his executors, with legacies; and gave all his estates real and personal to his sisters the defendants *Ann Rigby* and *Martha Hale*, and the defendant *Francis Hale* (now *Rigby*); to be equally enjoyed by [\*] them, share and share alike, for their respective lives; after the death of one of them, the two survivors to divide and enjoy the same in the like manner, share and share alike; and to the survivor of the three, he gave all his real and personal estate and effects, and to the heirs of such survivor:

[ \*61 ]

That the testator died without revoking the will, and leaving the defendant *Ann Rigby* and *Martha Hale*, his sisters and co-heiresses; and upon his decease, they, and testator's nephew, the defendant, *Francis Hale* (now *Rigby*) entered upon the estates, and *Caswell* having renounced, the defendant *Macnamara* proved the will, power being reserved to the defendant *Francis Hale* (now *Rigby*) to prove, and that defendant *Macnamara* and *Hale* (now *Rigby*), had possessed the testator's personal estate:

The bill further stated that the said *Francis Hale*, (who since the testator's decease had obtained His Majesty's licence to bear the name of *Rigby*), and the said *Ann Rigby*, *Bernard Hale* and *Martha* his wife, as residuary legatees of the said testator, exhibited their bill in this Court, against *Macnamara* the acting executor of the testator, praying an account of the personal estate of the testator, and an application of the same in payment of debts, &c. and that the residue might be paid to them, or secured for their benefit:

That at the hearing of the cause, 5th of *March*, 1790, it was referred to the Master to take the usual accounts, and that the personal estate should be applied in payment of debts, &c. and the defendant *Macnamara* admitting to have 6000*l.* in his hands, the same was ordered to be laid out in trust in the cause, and other usual directions were given:

That since the decree, Sir *Thomas Rumbold* was dead, having made his will, and the plaintiffs executors:

That the said sum of 50,047*l.* still continues due to the plaintiffs as executors of Sir *Thomas Rumbold*, from the estate of said *Richard Rigby*; and the plaintiffs have carried in their charge, and made due proof thereof before the said Master, in the said cause of *Rigby*, and *Macnamara*, of what remains [\*] due to them as such executors; and it appearing that the personal estate of the said *Richard Rigby*, come to the hands of the said *Macnamara* his sole acting executor, will not be sufficient for payment of his debts, the plaintiffs had applied to the said *Francis Hale Rigby*, *Ann Rigby*, *Bernard Hale* and *Martha* his wife, to prosecute the accounts directed by the said decree with effect; and in case it should appear that the said testator's personal estate is not sufficient to pay what remains due to plaintiffs, by sale or mortgage of a sufficient part of the testator's real estate devised to them, to raise money to answer the deficiency.

[ \*62 ]

The plaintiffs charged that the testator's real estate was liable, on the deficiency of the personal estate, to pay the bond debt, but that the defendant pretends the real estate is liable to some mortgage or other incumbrances,

incumbrances, and that the Attorney General on behalf of His Majesty, has claims on the estates, and also the annuitant on arrears of her annuity, and therefore prayed an account of the principal and interest of the bond debt, and to be paid out of the personal estate; and if that should not be sufficient, that the deficiency should be paid out of the real estate, and that the assets might be marshalled.

To this bill the defendants (except the defendant *Macnamara*) put in a general demurrer for want of equity.

*Mr. Mansfield* and *Mr. Richards* in support of the demurrer.

The objection to the bill is, that the plaintiffs are not entitled to any part of the relief they pray. And the whole matter being upon the record, the proper proceeding is by demurrer. As to the prayer of the account, that is already decreed in the cause of *Rigby v. Macnamara*. If there was no rule to guide the Court, they would see the absurdity of permitting two suits to be brought when the party has once come in, and has come in to prove his debt in a former cause. But in *Neve v. Weston*, 3 Atk. 557. there had been a bill by a creditor on behalf of himself and the other creditors, against the executor and devisee; the plaintiff came in under the decree in [\*] that cause, and then filed his bill against the executor and devisee, and made the heir at law a party, who was not so to the former suit; to this the executor and devisee pleaded the former suit depending, and Lord Chancellor said, that, "a man who comes in before a Master under a decree, is *quasi* a party to that suit; and the present plaintiff does not show an absolute necessity for bringing the heir before the Court: and allowed the plea." Here it appears by the bill that they have come in under that decree. Then, as to the prayer with respect to the real estates, that part of the bill cannot be supported till it appears that the personal estate is deficient, which cannot appear till the Master has made his report. The bill does not state that the personal estate is deficient, and therefore pray a sale; but prays that if the personalty shall be deficient, there may be a sale of the real estate: the words are only, "it appearing that the personal estate come to the hands of *Macnamara* is insufficient;" so that it does not appear what personal estate exists, or may have come to other hands. It is therefore not a sufficient allegation to support the bill.

Lord Commissioner *Eyre*.—It certainly would not be right to load the estate with the expence of two causes, if one is sufficient. This is a demurrer in the nature of a plea of a former suit depending. Such a plea would not be good, unless the former suit were of the same nature and effect. But this is a case in which the effect of this suit could not be had in the former suit. This demurrer admits *Mr. Rigby's* personal estate to be deficient; here are other parties, particularly the Attorney General, who may exhaust great part of the estate by the claim of the Crown; and then the creditors must be content to come in under a decree to be made in this cause. The former cause will not be useless for what is left. The Court have it in their power to order the account in one cause to be made use of in the second. The demurrer covers too much; the suit depending not being such as would be effective.

Lord Commissioner *Ashurst* concurred.

Demurrer over-ruled.

1792.

LAW  
against  
RIGBY.

[ \*63 ]



1792.

[\*64]

Lincoln's Inn  
Hall, 16th July.

Lords Com-  
missioners  
Eyre and  
Ashurst.

Order to pay  
money out of  
a particular  
fund, gives  
the party a  
specific lien  
thereon.

[\*] SMITH and Others, Assignees of LANCE, a Bankrupt, against  
EVERETT and Others, Assignees of MATON, a Bankrupt; and  
Others.

(Reg. Lib. 1791. B. fol. 420: b.)

**MATON** contracted with government to supply all the camps in England, about the year 1782, with certain articles: he made contracts with several sub-contractors, for the purpose of completing his contracts; of these sub-contractors, the defendant *Lance* was one, who contracted for the supply of the camps in *Essex*, *Kent*, and *Sussex*. The defendant *Everett*, was one of *Maton's* securities to government for his performance of this contract, and by the stipulation articulated, that all the monies paid by government were to pass through his hands. The subject of the present bill was, that the plaintiffs, as assignees of *Lance*, might be decreed to have a specific lien on the monies received by defendant *Everett*, and also on the monies remaining due from the Lords of the Treasury, on account of the contracts made between them and *Maton*, and for necessary accounts.

By the decree 26th of *June*, 1787, the late Lord Chancellor ordered it to be referred to the Master to enquire, whether *Maton* the bankrupt signed and delivered such order as in the bill is stated to bear date 27th of *November*, 1782, (being the order hereinafter stated,) and on what occasion, and whether both branches thereof were made on the same day, and when the same were respectively made and delivered to the defendant *Thomas Everett*; and that the Master should further enquire whether any and what sums of money have been received under, or any and what credit given to, such orders, and that the Master should take an account of the monies due to *Lance* or his assignees, for bread, &c. supplied to the encampments, pursuant to the terms of the contract with *Maton*, and reserved the consideration of costs and further directions until the Master should have made his report.

[ \*65 ]

The Master by his report dated 22d of *February*, 1792, reported that he found by the affidavit of *John Adcock* (who [\*] was clerk to the defendant *Everett*, and also clerk and agent of *Maton* in the sub-contracts) that on the 27th of *November*, 1782, the several encampments mentioned in the pleadings having broken up, *Maton* called at defendant *Everett's* counting-house, and delivered to him the said *John Adcock*, the order dated 27th of *November*, 1782, and which was in the following words: "*Salisbury*, 27th of *November*, 1782, Mr. *Thomas Everett*, please to pay out of the money you may receive of the Treasury on my account, all such bills as I have accepted and made payable at your house, which I agree to allow in your account, I am your humble servant, *John Maton*." That the said *John Maton*, at the time he delivered the order to *Adcock*, (as the said *Adcock* conceived,) intended that the same should likewise extend to, and be an authority to defendant *Everett* to pay *Lance* and *Hilder* (another sub-contractor) what should respectively be due to them on balance of their accounts, and that he (*Adcock*) not thinking the order a sufficient authority, requested *Maton* to give a more direct order to defendant *Everett* for that purpose; whereupon said *Adcock*, by direction and in presence of *Maton*, wrote under the said order, on the same sheet of paper, in addition thereto, the following words: (viz.) "You will also please to pay Messrs. *Lance* and *Hilder*, out of the aforesaid money, the balance that may appear due to them on account of the receipts delivered by them, for supplies  
" furnished

"furnished to the several encampments under their management, in due proportion with me and my other sub-contractors, and also for their remaining stores and carriage of bread, when I am paid by the Treasury for the same, deducting any damages that may have incurred by any neglect of them, or their agents, or expences of journees, &c. I have been put to." That *Maton* then in the presence of him *Adcock*, approved of, and signed the said additional branch of said order, and delivered both to him *Adcock*, as clerk to *Everett*, for the purposes aforesaid: and by said affidavit the Master found, that notwithstanding the said order bears date as at *Salisbury*, yet *Maton* wrote and signed the same in *London*; and that *Maton* was accustomed to date orders and drafts, drawn by him as at *Salisbury* (that being his then place of residence) although they were written and signed by him in *London*: and upon considering said affidavit, and no evidence having been laid before him to impeach the credit thereof, or controvert the [\*] same, he conceived that *Maton* signed and delivered both branches of said order on said 27th of November, 1782, to said *Adcock*, for, and as clerk to, said defendant *Everett*.

The Master then found a balance due from the estate of *Maton* to that of *Lance* of 994*l.* 2*s.* 6½*d.*, and for supplies furnished by him and the defendants *Hilder* and *Staffel* jointly, a further sum to the estate of *Lance* of 606*l.* 2*s.* 11½*d.*

And the cause coming on now, for further directions,

*Mr. Solicitor General* for the plaintiffs.

The question is, whether this order amounts to a lien, on the part of the plaintiffs, on the funds paid or to be paid to *Everett* on account of the encampments. If the party has supplied the camps in consequence of the order, that will give him a lien in the funds. In a bill in the Exchequer, on the subject of these contracts (*Edyvean v. Bowden*, Exch. 19th July, 1786,) the lien was established, because the goods were supplied on the credit of the order. The order is made payable at the defendant's house by *Maton*, and there is further authority to pay *Lance* and *Hilder*. In the case of *Row v. Dawson*, 1 Vesey, 331. a similar order was held to bind the fund.

*Mr. Selwyn* for the defendants. The late Lord Chancellor, when this cause came before him in 1787, was so far from considering the case of *Edyvean v. Bowden*, as an authority, that he would not make the same decree.

Lord Commissioner *Eyre*.—That was because he doubted as to the fact, and whether it was a fair transaction; as far as his opinion can be collected it was, and that there was a lien, otherwise he would not have sent it to the Master.

*Mr. Selwyn* and *Mr. Stanley* for defendants.—There was no direct lien, the direction is only, you will also be pleased to pay *Lance* and *Hilder* the balance which may appear due to them, this is surely a direction to *Everett* to settle their accounts, but could give them no lien on the fund. It would not be compulsory on *Everett* to pay them the money. It could not [\*] be a lien on future receipts; and with respect to monies already received, there was an easier remedy by action at law.

Lord Commissioner *Eyre*.—There cannot be the smallest doubt as to this matter. In the case in the Exchequer, *Edyvean* obtained a lien on account of the deed. Here the contracts were not entered into by deed, but the parties entered into these contracts with reference to the deed. As *Everett* was *Maton's* security, it was provided that the money should be paid to the sub-contractors by him, and he had the bills, in order to draw upon Government. There could not be a stronger appropriation

1782!

Suith  
against  
Everett

[ \*66 ]

[ \*67 ]

1792.

SMITH  
against  
EVERETT.

propriation of the fund than this. It was meant that the sub-contractors should have the same benefit of the deed with the parties to it.

Therefore the assignees of *Maton*, must give authority to *Everett* to pay to the assignees of the sub-contractors the balances due to them, and the plaintiffs must have a declaration that they have this lien on the fund.

Lord Commissioner *Ashhurst*.—*Maton* found it necessary to sub-divide his part of the contract. *Edyvean's* contract was such as to create a special lien, and it was intended the others should have the same benefits. This is not a debt, but a standing authority to *Everett* to give the other parties the same remedy. The parties stood in the place of *Maton*, and therefore their assignees have a right to a specific lien. (1)

(1) The Court declared that the assignees had a specific lien on the monies received by *Everett* from the Lords of the Treasury, on account of the contract made between them and *F. M.*, and upon the money received, or to be received, in respect of the said contract. R. L.

[Vide S. C.  
1 Ves. jun. 548.  
& 2 Cox, 301.]

*Lincoln's Inn*  
*Hall*, 15th, 16th  
July.

Lords Com-  
missioners  
*Eyre* and  
*Ashhurst*.

A bequest to  
be laid out in  
land for the  
support of  
preachers of  
two chapels, is  
a charitable use  
within the stat.  
of mortmain.  
Money to be  
invested until  
an eligible pur-  
chase can be  
had, is a devise  
of land, and  
void.

Gift of part of  
the fund to *A.*  
and *B.* who  
were then the  
preachers, with  
directions for  
their continuing  
to preach, is  
part of the  
general plan,  
and therefore  
void. (1)

[\*68]

### GRIEVES and Others against CASE and Others.

(Reg. Lib. 1791. A. fol. 367.)

*MARY PARKER*, in 1776, having established a chapel at *Fakenham Lancaster*, in the county of *Norfolk*, she made her will dated 20th of *November*, 1788, whereby she gave the sum of 600*l.* to be laid out in the purchase of freehold [\*] and copyhold lands, fine certain, as soon as could be after her decease, and till an eligible purchase could be made, her will was that the said sum of 600*l.* should be placed out at interest by her trusty and well beloved friend *Charles Case* of *Tostrees* in the said county, gent. his executors or administrators, whom she chose and appointed trustees for the purpose of receiving and placing out the same for the most interest he could safely get, till a purchase could be made, and for making such purchase, and upon trust and confidence that as soon as the said *Charles Case*, his executors or administrators, could meet with freehold lands, or copyhold lands, fine certain, suitable for the purpose, that he or they do purchase the same, and cause it to be conveyed to himself, or themselves, and the other trustees appointed by the survivor, in the rolls of the Court of *Fakenham Lancaster*, or in the court books thereof, and by the said deed enrolled for the said *Fakenham* chapel, and their heirs; and the said 600*l.* she gave upon trust and confidence, to the end, intent, and purpose, that the interest and produce thereof, till a purchase should be effected, and after effecting such purchase, that the rents and profits of the purchased premises should be fully, and as the same should become payable, duly applied and paid to such persons, in such parts and proportions, and at such times as were thereafter mentioned, (that is to say,) 2*l.* 10*s.* every year, part of the interest of the said 600*l.* or rent of the purchased premises, she, thereby, gave to her friend *Henry Rice*, for and during the term of his natural life; 5*l.* yearly, other part thereof, she gave to *Mary*, the wife of *John Riches*, for her life; 2*l.* 10*s.* yearly, other part thereof, she gave to the widow *Ann Pawley* for her life; 2*l.* 10*s.* yearly, further part thereof, she gave to the widow of the late *T. Waterson* for her life, all to be paid

(1) Vide 2 Fonbl. T. E. 208. 213. (ed. 1805.)

quarterly,

quarterly, on the most usual feast days, or quarter days in each year, and without any deductions whatsoever, in her chapel at *Fakenham* aforesaid; but her mind and will was, that in case her said annuitants, any, or either of them, should stand in need of parish relief, and the parishes or parish who ought to relieve them should take advantage of the above yearly gifts, and allow them any, or either of them the less on that account, then and from thenceforth the annuity or annuities of the person or persons so allowed the less, should be retained in the hands of her said trustee, his executors or administrators, and after proper parish relief should [\*] be obtained, he or they should give such retained sum or sums to the person or persons in whose favour they were intended by this her will, at his or their discretion, it being her intention that the same should not benefit any parish or parishes, but be a comfort and additional support to the said parties besides parish relief; all the residue of the said interest or rent, and also all the parts thereof hereinbefore given to the said *Henry Rice*, *Mary Riches*, *Ann Pawley*, and the widow *Waterson*, as they respectively depart this life, she gave and directed to be paid in equal moieties, the one to her friend *Thomas Mendham* of *Bristow Norfolk* teacher of the gospel, for his life; the other to her friend *Samuel Eastaugh* of *Fakenham* aforesaid, teacher of the gospel, for his life; and after the decease of the said *Thomas Mendham*, upon trust, that one equal third part of the said interest or rent, (the whole into three equal parts to be divided,) should be paid to the preacher or teacher for the time being, who should statedly officiate in the chapel in *Bristow*, belonging to the said *Thomas Mendham*, and where he then usually officiated; and the other two-thirds should be paid to her friend *Samuel Eastaugh* for his life, he and the said preacher exchanging on the Lord's day, alternately, the one at the said chapel in *Fakenham*, the other at the said chapel at *Bristow*, as hereinafter mentioned: Provided always that the said *Thomas Mendham* and *Samuel Eastaugh*, do not voluntarily withdraw from, and refuse officiating at the said *Fakenham* chapel, when able, as usual. In which case, the part or share of him or them so withdrawing and refusing, should during such recess, cease, and go to the preacher or preachers who should be chosen, and officiate in his or their room or stead, and from and after the decease of the said *Samuel Eastaugh* and *Thomas Mendham*, and the decease of the longer liver of them, upon trust, that such interest or rent be duly paid for ever, to the preachers for the time being, who should be chosen by the trustees of *Fakenham* chapel, and the trustees, or the major part of communicants of her friend *Mendham's* aforesaid chapel, at *Bristow*, in the following proportions, (to wit) two-thirds thereof, (the whole into three equal parts to be divided) to the preacher of her own chapel, in *Fakenham*; and one-third part of the said interest or rent to the preacher, for the time being, of the said *Bristow* chapel, which said two preachers should officiate by turns, and exchange or supply each others places alternately, and constantly [\*] supply *Barney* chapel between them, if the proprietor thereof should think meet: provided always, that the gratuity for *Barney* chapel be equally divided between such two preachers, and whatever donations were, or thereafter might be left, for the support of the said *Bristow* chapel, two-thirds thereof should go to the stated preachers thereof, and the other third should be paid for ever to the stated preachers of *Fakenham* chapel. *Item*, notwithstanding what has been before said in this her will, it was her desire, and she did thereby request that the said *Samuel Eastaugh* should not continue a stated preacher in the said chapel, nor enjoy the benefit intended him by this her will, for any longer time than he continues to preach the Gospel of Christ Jesus.

1792.

GRIEVS  
against  
CASE.

[\*69]

[\*70]

On

1792.

GRIEVES  
against  
CASE.

On a bill for distribution; and to have these devises declared void, as being in mortmain, Three questions were made :

1st. Whether the bequests as far as they related to the chapels of *Bristow* and *Fakenham*, were charitable uses ?

2d. Whether they might not be kept on foot as money legacies ? (2)

3d. Whether if they were void, the bequests to *Mendham* and *East-sugh* could be supported as distinct interests, unconnected with the charities ?

As to the first question, the Lords Commissioners were of opinion, it was a charitable use, in respect of the benefit the congregations were meant to derive from the preaching of their teachers.

As to the second, the case of *Grimmet v. Grimmet*, Amb. 210. was cited in argument ; there money was directed to be laid out in the funds for charitable uses, until it could be laid out in the purchase of lands to the satisfaction of the trustees, and which it was held gave an election to the trustees to keep it in the funds, if they chose it ; and therefore the bequest was supported.

[ \*71 ]

[\*] But the Court said that case was grounded upon a very nice criticism of the expressions ; they would not express any opinion upon that case, because this case fell within the exception allowed by Lord *Hardwicke* to vitiate the devise, because *land* ultimately is the thing intended here to be given.

3d. It was contended that *Mendham* and *East-sugh* were meant personal bounties, without any express condition annexed, and that if they were removed or prevented by illness from preaching, or by any other means than voluntary desertion, they were to keep their life interests, and cited *Doe v. Aldrich*, 4 Term Rep. 264. ; and said, Lord *Thurlow* was of this opinion when the cause first came on to be heard, and had therefore directed that the annuities were not to be delayed.

But the Lords Commissioners held that Lord *Thurlow*'s opinion, as far as could be collected from the decree, extended only to the annuities properly so called, which were so termed by the will, and were properly so, being given out of the fund, but did not extend to the bequests to *Mendham* and *East-sugh*, which were of the surplus of the fund itself.

They held that the general scheme of the will was, to vest the money in land, as a perpetual fund for the charity intended, of which *Mendham* and *East-sugh* were to take the parts allotted to them, *ed ratione* as preachers, and for that purpose ; and relied on the clauses imposing the duty of preaching, as clear evidence of that intention. That therefore their interests were provided out of the charity fund, as part of the general scheme inseparably annexed to it, and which must fail by the failure of the plan. They decreed therefore for the plaintiffs, and declared these bequests void. (3)

(2) See the points, which were insisted on when the cause came on originally before Lord *Thurlow*, &c. &c., fully stated in Mr. Cox's report of the principal case, 2 vol. 305. &c.

(3) The Court, upon this occasion, " declared, that the disposal of the estate made by the testator's will, in favour of the defendants *T. M.* and *S. E.*, and the persons in whose favour the trust of the sum of 600*l.* is limited after the decease of the defendants *M.* and *E.*, and of the sum of 400*l.* in the event of *E. G.* dying under the age of twenty-one years, being a disposition to a charitable use, the same is to be considered as a void devise, and contrary to the statute made in the 9th year of His late Majesty King *George the Second*, &c." R. L.

[\*] BLOUNT against BURROW.

(No Entry.)

THE bill stated that Sir James Burrow had, by his will dated 9th of May, 1781, bequeathed to John Burrow Esq., his nephew, a legacy of 3000*l.*, which he directed to be paid in the manner mentioned in his will, and appointed defendant Robert Burrow, executor of said will; and on the 9th of January, 1781, made a codicil to said will, whereby he revoked the said legacy of 3000*l.*, and by said codicil, gave and bequeathed the like sum of 3000*l.* to the defendant his nephew, Robert Burrow, his executors and administrators, upon trust, from time to time, to receive the dividends and profits arising from said legacy, and to pay and dispose of the same into the hands, and for the proper use and benefit of said John Burrow, and for which his receipt should be sufficient, and upon further trust, after decease of said John Burrow, to transfer and assign said legacy to his executors and administrators.

John Burrow being so entitled by said codicil to the legacy of 3000*l.*, on the 24th of May, 1788, made his will, and thereby gave to plaintiff 2000*l.*, to be paid three months after his decease, out of 2000*l.* remainder of a legacy in his favour from the late Sir James Burrow, and that ready money, bills, or bonds he had by him at his death, and to his residuary the defendant, Robert Burrow, he bequeathed the residue and remainder of said legacy and ready money, and the residue of his personal estate he gave unto defendant James Waller, his heirs, executors, administrators, and assigns, and appointed him sole executor. The defendant Robert Burrow set up a claim arising under the marriage settlement of testator John Burrow, to retain the 2000*l.* against the plaintiff's legacy, but that claim was immaterial to the subject of the present cause.

The bill was filed against defendant Robert Burrow for payment of the legacy of 1000*l.* out of the remaining 2000*l.* of the legacy, and against Waller for an account of the personal estate of testator come into his hands as executor.

[\*] The defendant Waller, by his answer, said he had possessed effects only of trifling value of the testator, and that defendant Burrow insisting on his right to retain the 2000*l.* he could not pay the legacy.

At the hearing of the cause, 22d of June, 1790, it was referred to the master to take the usual accounts; and further directions were reserved till after he should have made his report.

The defendant Waller, being examined upon interrogatories, put in the following examination. "But this examinant saith, that the said testator did, on or about the 26th day of December, 1788, being about twelve days previous to his death, give and deliver to this examinant four India bonds for the respective sums of 100*l.* for this examinant's use, to enable him to carry on and maintain a suit, which said testator commenced in this honourable Court, against Sir Francis Wood Bart., and the said Robert Burrow, and Henry Boldero Esq., since deceased, in or about Michaelmas term, 1788, and which was at the death of

1792.

[\*78]

[Vide 8*th* B.  
1 Ves. jun. 546.]Lincoln's Inn  
Hall, 18th July.Lords Com-  
missioners  
Eyre and  
Ashurst.Donatio mortis  
causâ may be  
for a particular  
purpose. (1)[If a party is  
charged by  
means of his  
own examina-  
tion, &c., he  
may read the  
whole of it  
in his dis-  
charge. (2)]

[\*73]

(1) Upon the nature of these gifts, see 1 Roper on Legacies, 1. *et seq.* *Hill v. Chapman*, 2 vol. 612. with the other references in the Editor's note there; and *Tute v. Hillert*, *postea*, 286.

(2) See the report, 1 Ves. jun. 546.

1792.

Blount  
against  
Burrow.

" the said testator, and still is, depending and undetermined, and therefore the examinant claims the same."

The Master, in his report, charged the defendant *Waller* with these bonds as part of the personal estate of the testator *John Burrow*.

And the defendant excepted to the report on that account.

Mr. *Lloyd* and Mr. *Hall*, for the exceptant, argued that the Master was wrong in reporting that the 400*l.* *India* bonds, were part of the testator's personal estate; for by the defendant's examination, the fact of the delivery of them to the examinant for his own use, was clear; and the *India* bonds were the proper subject of a *donatio causâ mortis*, and the delivery was a good *donatio causâ mortis*. *Snellgrove v. Bailey*, 3 Atk. 214., shews this, and also that the defendant's evidence is sufficient. There was no evidence in that case but the defendant's answer, and it was held sufficient. So it was in *Hill v. Chapman*, (*ante*, vol. ii. p. 612.) where the gift was proved (as here) by [\*] the defendant's examination. Here it does not appear, otherwise than by the examination, that the 400*l.* bonds are in the defendant's possession; and if the examination is read for the purpose of charging them, it must be read for the purpose of discharging him also, *Kirkpatrick v. Love*, Amb. 580. 1 Eq. Abr. 10.

[ \*74 ]

Mr. *Selwyn* and Mr. *Ainge* for the plaintiff.

In the examination these bonds are not claimed as a *donatio causâ mortis*, but as a sum intrusted to the defendant to carry on a suit commenced by the testator. Certainly an *India* bond may be made the subject of a *donatio causâ mortis*, but, to be so, the gift must be in *extremis*: and, under suspicious circumstances, the Court will not declare it to be so, upon the party's own oath. Here the whole fund is but 530*l.* including the bonds, the disbursements amount to 200*l.*, so that the testator is supposed to have given away what will not leave enough for the necessary disbursements; and the defendant did not state this matter in his answer, or until this examination, in answer to interrogatories in which *India* or other bonds were enquired to. Then the question is, whether in such a case the defendant shall be admitted to avail himself of his own oath. The receipt of the bonds may be proved so, because it is capable of proof by other evidence; but the gift cannot be proved by the defendant's oath, because it must be proved by other means. Mr. *Ambler*, in the case cited, refers to a case of *Talbot v. Rutledge*, but that case was determined the other way. The date was the 17th of *October*, 1747, and the case was as follows:

Plaintiff and defendant dealt in the lace trade as co-partners; the bill was brought for a general account, and the decree pronounced with the general directions; defendant was sworn before the Master touching his receipts and payments: on his examination in writing, he acknowledged the receipt of *some* sums of money, but swore in his examination that he disbursed *those* monies at other times, on account of the partnership dealings; and the Master, by virtue of that examination, charged the defendant with his receipts, and put him upon [\*] proving the discharge; there was no other proof than as above to charge the defendant.

[ \*75 ]

Defendant took the general exception to the Master's report; and on arguing the exception,

Lord Chancellor *Hardwicke* declared, that the rule of this court, and the court of law, as to reading an answer or examination against a party, is different. That this court is too confined in their rule, and the court of law is too large: that one part of an answer, in this court, may be read against a party, without reading the answer throughout; but at law it is otherwise: and if the judge at law considers, that though

the whole of the answer is read there, yet every part of the answer or examination is not of equal credit, he thought the rule of law to be preferred. In this court, if a man is to be charged by a book, or other writing, he shall also be discharged, if the entries are made for that purpose therein; and so have been many cases relating to goldsmiths' and merchants' accounts; and that was allowed in a case relative to the estate of Sir *Stephen Evans*. But what is sworn by a man's answer or examination admits of a different consideration; as, if a man admits, by his answer, that he received several sums at particular times, and in the same answer swears he paid away those sums at other times in discharge, he must prove his discharge, otherwise it would be to allow a man to swear for himself, and to be his own witness.

The Court over-ruled the general exception taken by the defendant to the Master's report, and confirmed the report.

His Lordship referred to 2 Vern. 194. *Howard v. Brown*.

Lord Commissioner *Eyre* said, its being for a particular purpose did not prevent its being a *donatio mortis causæ*, the law implies the condition.

Mr. *Lloyd* in reply.

[\*] It appears from *Hill v. Chapman*, that the gift, in order to be *donatio mortis causæ*, need not be in *extremis*; there is no averment in any of the cases that it was so, or that the giver expressed that as the cause of the gift. But if this was necessary, the giver in this case died within ten days after the gift, so that it may be presumed it was given in contemplation of his death. If he gave the bonds to the defendant *Waller*, it was an ademption of the legacies in the will as to these. But it is not necessary to decide this question between co-defendants, as there is enough to pay the present plaintiff.

Lord Commissioner *Eyre*. The purpose of this suit will be answered by decreeing the plaintiff his legacy; but is there any case where a legatee can have his legacy without the whole fund being arranged? If the 1000*l.* is to arise here out of both the funds, that introduces a question, as the persons interested in the residue must be parties.

The best way will be to send it to an issue, whether the bonds were delivered by the testator to defendant *Waller*.

1792.

*Blount  
against  
Buzanov.*

[ \*76 ]

### MILDMAY against MILDMAY.

(Reg. Lib. 1791. B. fol. 597. b.)

**CAREW HENRY MILDMAY** Esq. by will, 14th of July, 1778, devised his manors, &c. in the counties of *Essex*, *Somerset*, *Dorset*, and *Southampton*, and elsewhere in *England*, to trustees for ninety-nine years, and subject to payment of debts and legacies, he gave the same to the use of his daughter *Ann Mildmay*, afterwards called *Ann Hervey Mildmay*, for life, but without power to do or commit any manner of

the claims discussed, when tenant in tail of age.<sup>(1)</sup>

(1) The Third Edition notices that Lord *Loughborough* C. afterwards directed the money to be laid out in land to be settled to the same uses. This is now the general course, though the practice is of modern origin, and some difficulties now and then present themselves. See *Burgess v. Lamb*, 16 Ves. 174. &c. 182., and *Delapole v. Delapole*, 17 Ves. 150.

Ca. 28th June.  
*Lincoln's Inn  
Hall*, 20th July.

Lords Com-  
missioners  
*Eyre* and  
*Ashurst*.

Bill, by tenant  
in tail in re-  
version to have  
timber cut,  
ordered; and  
that the money  
be laid out in  
the funds, and



1792.

MILD MAY  
against  
MILD MAY.

[ \*77 ]

waste; with remainder to trustees to preserve contingent remainders; remainder to her first and other sons; remainder to daughters; remainder to the plaintiff's mother Dame *Jane*, the wife of Sir *Henry Paulet St. John Mildmay*, by the description of *Jane Mildmay*, spinster, daughter of testator's nephew *Carew Mildmay*, for life, *without power to do or commit any manner of waste*; [\*] remainder to trustees to preserve contingent remainders; remainder to the 1st, 2d, 3d, and every other son and sons of said *Jane Mildmay* in tail male; remainder to *Ann Mildmay*, another daughter of said *Carew Mildmay*; remainder to *Letitia Mildmay*, another daughter of said *Carew Mildmay*; with divers remainders over; with an ultimate remainder to testator's right heirs. And there is a proviso in the will, whereby power is given to the persons in possession of the real estate to cut coppice wood; but no further trusts of the term of ninety-nine years were declared.

The testator died in 1784, *Ann Mildmay* entered and died in 1789, leaving defendant Dame *Jane*, and *Ann* and *Letitia Mildmay*, her co-heiresses at law, and also co-heiresses of the testator. *Jane Mildmay*, in the year 1786, intermarried with Sir *Henry Paulet St. John*, (now the defendant Sir *Henry Paulet St. John Mildmay*,) and they have had issue the plaintiff, their eldest son, and another child; and, on the decease of the said *Ann Hervey Mildmay*, Dame *Jane*, and her husband, Sir *Henry* in her right, entered and took possession of the estate devised to said Dame *Jane* for life; and the plaintiff, as first son of the marriage is entitled to an estate-tail in the manors, &c. so devised, expectant on the determination of the estate for life of his mother therein.

There being a considerable quantity of timber standing on the estates fit to cut, and in danger of running to decay; the present bill was filed, on behalf of the infant tenant in tail in remainder, praying that the timber might be cut and sold, and the money paid into the Bank, and laid out at interest, to accumulate for the benefit of plaintiff, or such persons as shall become entitled to an estate of inheritance in possession, of the manors, &c. by virtue of the will of the testator, &c.

The defendants Sir *Henry St. John Mildmay*, and Dame *Jane*, his wife, admitted the facts, but insisted the interest, dividends, and proceeds of the money to be obtained by the sale of the timber, ought to be paid to defendant Dame *St. John Mildmay*, during her life.

[ \*78 ]

[\*] The cause came on to be heard, 2d of *July*, 1790, when the Lord Chancellor referred it to Master *Graves*, to see whether it would be for the benefit of the plaintiff the infant, and the persons interested in contingency, to have the timber cut down, and upon what terms.

The Master made his report, dated 20th of *November*, 1790, stating a very large number of trees, and to a great value, to be fit to be cut down, and stating the interests of the several parties, and that proposals had been made to him of proper persons to select the trees proper to be cut, of which proposal he had approved, and thought it would be for the benefit of the plaintiff, and the persons entitled in contingency to said estates, to have the timber cut, and the purchase-money paid into Court for the benefit of the parties interested therein.

The matter being opened as before stated, and Lord Chancellor saying he saw no objection to such a contract between the tenant for life, and tenant in tail.

Mr. *Solicitor General* (for the defendants Sir *Henry* and Lady *Mildmay*,) said he did not rise to oppose it on the terms proposed by her answer, but that the Court was not in use to allow such covenants: that

that in *Garth v. Cotton* (2), (3 Atk. 751.) where the tenant for life was restrained from committing waste, and the first remainder-man in being, was not, and they entered into a contract to fell timber and divide the money, an intermediate remainder-man being afterwards born, recovered for the waste committed by that collusion: so here, if the present remainder-man should die without coming into possession, and another remainder-man should come into possession, he would have a right to treat this as waste. The person entitled to commit waste, must wait till he comes into possession. It is the duty of the trustees to preserve contingent remainders to prevent waste from being committed, they are to protect timber, mines, &c.

Mr. *Mitford* (for the plaintiff) said, that was the reason the prayer of the bill was, that the money should be laid out for such person as should become entitled to possession. He [\*] cited *Tullit v. Tullit*, Amb. 370., and *Marsh v. Lisle*, before Lord *Bathurst*, 1778, and also the case of *Williams v. The Duke of Bolton*, (stated in Mr. Cox's note on 3 *Wms.* 268.) where the money was ordered to be invested in the funds, for the benefit of the person who should become entitled.

Lord *Chancellor* said, that was on a different ground, because it was an abuse of his situation as tenant for life. He doubted whether there ever was a case where tenant in tail and tenant for life had agreed to cut timber, and divide the money, and afterwards the tenant in tail dying, and another becoming entitled had filed his bill to have the money, on account of the iniquity of the contract; but he thought that, by turning this into money, he might vary the nature of the property and its consequences; and would not go the length of the purpose for which the bill was framed: that there was no doubt, in this case, of the propriety of cutting the timber, and of the fairness of the proposal; but it would be more proper the money to be produced by the sale of the timber, should be laid out in land to the same uses, and directed the order to be taken so *de bene esse*.

Upon this cause coming on again, it was referred to the Master to particularise the timber necessary to be cut.

After the report of proper timber, and an order for cutting it, and after the timber had been actually cut, this cause came on again for further directions before the Lords Commissioners *Eyre* and *Ashhurst*.

Mr. *Mitford* contended, on behalf of the infant tenant in tail, that the money produced by the sale of the timber, ought to be laid out in the funds, to accumulate till the tenant in tail should be of age, and that if he should die, any person who might be entitled, should be at liberty to apply.

Mr. *Solicitor General*, for the defendants, insisted, that although the tenants for life could not themselves cut timber, yet nobody could cut it without their consent; therefore, if the tenant in tail was of age, he could not cut it but upon terms with them, and they [\*] would not consent unless upon those of having a life-estate in the money.

Lord Commissioner *Eyre* said, the claim of the tenants for life would be open to them, when the tenant in tail should come of age. That he thought the Court had done wrong in doing for the tenant in tail, what he could not have done for himself; but that when he should come of age, the claims must be discussed in a bill, and in the mean time the money to be invested in the funds.

Lord Commissioner *Ashhurst* concurred.

It was therefore ordered accordingly, and that the costs should be

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MILDMAY  
against  
MILDMAY.

[ \*79 ]

[ \*80 ]

(2) This case seems better reported in 1 Ves. 524. 526. and in 1 Dick. 183., which latter is from Lord *Hardwicke's MS.*

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MILDMAY  
against  
MILDMAY.

paid by the plaintiff, reserving the consideration (3) out of what fund they should come.

(3) Whether the plaintiff should, and how be re-imburshed such costs, and likewise the plaintiff's costs, until the question should arise unto whom the Bank Annuities directed to be purchased should belong. R. L. The money was afterwards laid out in the purchase of lands which were settled to the same uses.

[S. C. 1 Ves.  
jun. 565.]

Lincoln's Inn  
Hall, 18th, 23d  
July.

Lords Com-  
missioners  
Eyre and  
Ashurst.

Court will not  
decree a specific  
performance of  
a purchase  
where there is  
a doubtful  
title. (1)

COOPER and Others against DENNE, *et è contra*.

(No Entry.)

THESE were cause and cross cause. The plaintiffs in the original cause filed their bill against Mr. Denne, stating that *Moses Franks*, deceased, wishing to build an house, for his own residence, at *Teddington, Middlesex*, and *John Perkins Esq.* being seised of an estate for life, with remainder to his first and other sons in tail male, of several parcels of land there, under the will of his father *Mathias Perkins*, Mr. *Franks* treated with the said *John Perkins* to take the same upon lease.

Accordingly, by indenture of lease dated 24th of June, 1763, reciting a private act of parliament passed in the first year of His present Majesty, reciting the will of the said *Mathias Perkins*, and that great improvements, might be made of the premises, by granting building leases thereof for the benefit of the persons entitled under the said will, which could not be done without the aid of parliament, it was enacted, that it should [\*] be lawful for the said *John Perkins*, by indenture or indentures to demise, lease, or grant, all, or any part of, the said premises, unto any person or persons who should be willing to build upon, or substantially repair the same, for any term not exceeding ninety-nine years, to take effect in possession, so as such lease should be made, in order for the premises to be built upon, or otherwise lastingly repaired and improved, and so as there should be reserved and made payable quarterly or half-yearly, the best and most improved yearly rent or rents that could be gotten for the same, without taking any sum by way of fine, and so as the tenants should enter into covenants to keep the premises in repair, and other usual covenants: it was witnessed that the said *John Perkins*, by virtue of the said power, did demise to the said *Moses Franks*, all that piece of arable land, called the *Wheatfield*, containing by estimation seven acres, together with the tithes thereof, to hold to the said *Moses Franks*, &c. for ninety-nine years, at the rent of 28*l.* 5*s.* 6*d.* per annum, in which lease was a covenant, on the part of *Franks*, to build a substantial messuage or tenement on the premises, and to lay out 1000*l.* in the building.

By another lease of the same date, and between the same parties, and reciting the power, said *John Perkins* demised to the said *Moses Franks*, all that piece of land called the *Long Meadow*, containing six acres, with the tithes for ninety-nine years, at the rent of 24*l.* 4*s.* 6*d.* per annum, in which lease was a covenant on the part of *Franks*, to

(1) The Editor has already observed in his note to *Shapland v. Smith*, *ante*, 1 vol. 76. note (4), that although Lord *Eldon* C. has repeatedly disapproved of the Court's letting purchasers off where the title was doubtful, his Lordship has always felt himself bound by that course. See the authorities there collected; and *Wheat v. Hall*, 17 Ves. 80.; and *Sloper v. Fish*, 2 Ves. & Beam. 145.

erect a tenement or building thereon, and to expend 100*l.* in such building.

By a third lease of the same date, the said *John Perkins* demised to the said *Moses Franks*, the piece of ground called *The Little Meadow*, with the erection or building thereon, containing three acres, together with the tithes for the term of thirty-one years, at the rent of ten guineas, in which lease is a covenant from the tenant to keep the said building in repair.

In all the leases there were covenants from *John Perkins*, that *Franks, &c.* should hold and enjoy the premises, without any eviction, &c. from *Perkins*, his heirs or assigns, or any person claiming under him or them.

[\*] The *Wheatfield* being the part best adapted for building, Mr. *Franks* built thereon a capital brick mansion-house, fronting south toward the river *Thames*, with coach-houses, stables, and other offices, and a green-house and hot-house, &c. and laid out the remainder of the seven acres in pleasure and garden ground; and in erecting and building the same, he laid out 10,000*l.* and upwards. He built an ice-house on the six acre piece, and laid out 100*l.* and upwards; and he repaired the building on the three acre piece, and laid out the rest of the six acre and three acre pieces for the use and accommodation of the mansion-house; and when the house, &c. was completed, Mr. *Franks* went to reside there, and continued so to do till his death.

*John Perkins* having a son named *John David Perkins* who was tenant in tail of the premises, and he having attained his age of twenty-one years, they agreed to join in suffering a recovery, and accordingly by lease and release 25th and 26th of *November*, 1785, they conveyed the said three pieces of land demised to the said *Moses Franks*, and other premises, to *Winbourn*, to make him tenant to the precipe for the purpose of suffering a recovery, the uses of which were declared to be to the use of *John Perkins*, for life, *sans waste*, remainder to a trustee for five hundred years upon the trusts therein mentioned, remainder to *John David Perkins* in fee; and the recovery was suffered.

*John David Perkins* being so entitled to the remainder in fee expectant on the death of his father, subject to the term, applied to *Skinner and Dyke* to sell the same by auction, who accordingly prepared particulars of the same, in which the premises in question were described as being in lease to, and in the possession of, Mr. *Franks*, and sold the same by public auction to *George Peters* of *London*, merchant, the term and rent under which Mr. *Franks* held the same, having been declared and added in writing to the printed particulars; and by indentures of lease and release, 10th and 11th of *February*, 1786, the remainder in fee was conveyed by *John David Perkins* to Mr. *Peters*, and the leases made by *John Perkins* to Mr. *Franks* were particularly taken notice of.

[\*] In *April*, 1789, *Moses Franks* died intestate, leaving *Phila Franks* (who is since become a lunatic) his widow, and the plaintiff Mrs. *Cooper* his only child, to whom letters of administration have been granted for the use and benefit of her mother during her lunacy.

The plaintiffs, Mr. and Mrs. *Cooper* possessed themselves of the premises, and of the leases thereof, and the affairs of Mr. *Franks* requiring that the same should be sold, the plaintiff gave instructions to Mr. *Christie* to sell the same, and he caused printed particulars to be prepared, and on the 15th of *April*, 1790, put up the same to sale, and having in the particulars stated the tenure inaccurately, he, previously to the sale, made a declaration of the real state of the leases, and that one acre, part of the kitchen garden, was held at will, at 2*l.* 2*s.* per annum, and such declaration was written underneath one of the printed particulars, and he declared that the fixtures were to be valued; and having put up

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against  
DANIEL.

[\*82]

[\*83]

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against  
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the premises to sale, the defendant was declared the best bidder, at the sum of 509*2*l. 10*s.* and paid a deposit of 500*l.* into the hands of Mr. *Christie*, and signed an agreement, dated 15th of *April*, 1790, whereby he undertook to pay the remainder of the purchase-money upon having a good title of the premises executed to him.

After the sale, an abstract of the plaintiff's title was delivered to the defendant's solicitor, and the defendant was let into possession; but by agreement it was to be without prejudice to any objection the defendant might make to the title.

Doubts arising upon the title, the abstract was laid before counsel, under whose advice Mr. *Denne* declined completing the purchase.

Upon that a bill was filed by the vendor for a specific performance.

[ \*84 ]

Mr. *Denne* put in an answer to this bill admitting the facts, and stating the opinion of counsel, that the title was materially defective and exceptionable, particularly as it was extremely doubtful whether the leases executed by *John Perkins* to *Moses Franks* were not void, as not conformable to the power given [\*] by the act of parliament to grant building leases; and moreover, as he had been informed that *Franks* paid *John Perkins* 100 guineas, or some other sum of money, as a fine for granting the leases, free from tithes. He further admitted, that his being let into possession, was upon a previous agreement, that it should be without prejudice to any objection that he might make to the title. He said that the house being out of repair, he had laid out 100*l.* in repairs; and that, after he had been informed of the objection to the title, he had acquainted the plaintiff Mr. *Cooper* therewith, and of his intention of quitting the premises until the objection should be removed, and the purchase completed; but that it was afterwards agreed between the plaintiffs and defendant, that he should continue in possession from *Midsummer*, Old Stile, to *Christmas*, Old Stile, as tenant to the plaintiffs, at the rent of 105*l.* for that term; and the defendant accordingly continued in possession until the *Christmas* following, when he delivered up possession; and offered to pay the rent to the plaintiffs, which they refused to accept, he admitted therefore, that he had refused to complete the purchase, but that he was willing so to do, if the Court should be of opinion that the leases were good in law, and in that case, insisted he ought not, in regard to the money laid out in repairs, to be compelled to pay interest for the purchase-money.

[ \*85 ]

Mr. *Denne* afterwards being informed that 100 guineas had been given by Mr. *Franks* upon granting the leases, as a fine for including the tithes in the demise, which it was apprehended was expressly contrary to the power in the act of parliament; and having no other evidence of this, but what fell from Mr. *Cooper* in a conversation with Mr. *Denne*, when no other person was present, filed a cross bill stating to that effect, and charging that the plaintiffs in the original suit could not make a good title to the premises, on account of the leases not being made conformably to the power, and on account of the said fine paid, and that *Cooper* had in his possession a letter or other paper of *John Perkins* acknowledging the receipt thereof: it also charged that Mr. *Peters*, who claims the reversion, and *John David Perkins* had threatened, after the death of *John Perkins*, to contest the validity of the leases, as not being made in conformity to the power; and upon application [\*] to them had refused to confirm the leases: the cross bill therefore prayed that the contract might be delivered up to be cancelled, and Mr. *Denne* be declared to be discharged from the purchase, and the deposit returned.

Mr. and Mrs. *Cooper* put in an answer to the cross bill, by which they said they could not set forth whether *Moses Franks* paid any sum by way of fine for the leases, except that in a paper set out by Mr. *Cooper*, appearing to be an account of drafts on his banker, there was an item

"1763, July 19th, draft on *Hankeys*, payable to *Perkins* for tithes 105l." and that the account was found by defendant and Mr. *Pitches* his solicitor, among a number of papers belonging to Mr. *Franks*; and Mr. *Cooper* said, that having discovered the premises to be tithe free, he informed Mr. *Denne* that an allowance would be expected in consequence thereof, and that Mr. *Cooper* and Mr. *Denne* having met afterwards, and Mr. *Denne* having expressed surprise that the premises were tithe free, Mr. *Cooper* then said he could only account for it, upon a supposition that Mr. *Franks* had given a consideration for it, which arose from a recollection he had of this item in the account. They further said they did not believe *John David Perkins* or Mr. *Peters* had threatened to contest the validity of the leases; on the contrary, they believed that *John David Perkins* had never been made acquainted with the disputes between plaintiffs and defendant, and Mr. *Peters* had declared that he would never attempt to take advantage of the invalidity of the leases, supposing them to be invalid, or take any steps to try the validity thereof.

The causes came on to be heard before Lord *Thurlow*, 26th of Jan. last, when it was referred to the Master to see if a good title could be made to the premises, and costs and further directions were reserved till the Master should have made his report. The Master on the 25th of April made his report, and thereby certified his opinion, that a good title could not be made to the premises in question, and an order *nisi* having been made for confirming the Master's report, the plaintiff in the original cause filed an exception to the report, for that the Master ought to have certified that a good title could be made to the premises.

[\*] Mr. *Solicitor General* (in support of the exception.) There are two questions in this cause, 1st. Whether the leases were originally good. 2d. Whether they were confirmed by the recovery.

Lord Commissioner *Eyre*. It can hardly be argued that the leases are good, under the power in the act of parliament. The second question may be of more importance.

Mr. *Solicitor General* then stated the circumstances much at large, and contended that, as the leases were recited in the recovery, and also in the particulars under which Mr. *Perkins* purchased, they were confirmed: and that whatever equity *John David Perkins* would have against Mr. *Peters*, the executors of Mr. *Franks* would have the same; and if Mr. *Denne* was evicted, he would be entitled to a compensation.

Mr. *Mansfield*, Mr. *Stanley* and Mr. *Cooke* (on the other side) contended that the Master's report was right, and a good title could not be made. There were two questions, 1st. Whether Mr. *Denne* could have a legal title? 2d. Whether he could have an equitable title? The deed to make a tenant to the *præcipe* cannot amount to a confirmation of the leases, as cases of confirmation by deed must be either express confirmations, or by the necessary effects of the deed. The object in suffering the recovery in this case, was a very different one, the validity of the leases was not in contemplation; and where one consideration appears in a deed, a different consideration cannot be implied. *John David Perkins* who sold to *Peters*, knew nothing of the leases. Nothing that has been done can bind Mr. *Peters*.

Lord Commissioner *Eyre*. I am much struck by the observation that Mr. *Peters* cannot be affected by any thing done in this suit.

For the defendant. If the articles do not amount to a legal confirmation, Mr. *Denne* could only have an equitable title, and subject still to the same doubts. In *Shapland v. Smith*, (*ante*, vol. i. p. 75.) Lord Chancellor would not compel a purchaser to take a doubtful equity. Mr. *Denne* contracted for a [\*] legal title, and he cannot be compelled to take one that is merely equitable.

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against  
DENNE.

[ \*86 ]

[ \*87 ]

Mr.

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Mr. *Solicitor General* in reply. Where damages might be recovered at law, for the non-performance of an agreement, this Court will always decree a specific performance, though the converse of the proposition is not always true. I do not see what the case of *Shapland v. Smith* has to do with the principle of this case. It is a strange thing to say that wherever a doubt may be raised upon a title, the party shall be sent to law. Whether this is a doubtful equity, is the question I first mean to contest. I submit that, under the recovery and the deeds, the legal title is in the persons who now propose to sell to Mr. *Denne*. The recovery operates as a confirmation, because it shows the intent of the parties to confirm the leases. The leases are certainly good during the life of *John Perkins*: he had a capacity to make good leases without his son, and has covenanted to make good the leases. It is not necessary to a confirmation, that there should be technical words, or that it should be specified in the *habendum* of the deed; it is sufficient that it is shewn to be intended, Moore, 91. Here it must have been the intention to pass the estate subject to the leases, and that is enough.

Lord Commissioner *Eyre*. In suits for the specific performance of a contract, it is always in the discretion of the Court, whether they will decree a specific performance or not. In the particular case of a bill for a specific performance of a contract for the purchase of an estate; where there are considerable difficulties on the face of a title, and there are no means of clearing them up, and no jurisdiction to bind the question, I think that is not the case for decreeing a specific performance. The inclination of my opinion would be, that these leases are confirmed, and that the intent so to do is sufficiently shewn; but another difficulty arises: I doubt, whether the continuance of leases after a recovery suffered, does not depend more on the statute of Henry the Eighth†, than on the recovery itself. If an estate in lease is made the subject of a recovery, the term continues by force of the statute. It is probable the parties did not mean to affect the leases. We adhere to those cases which have determined that when titles are doubtful, the Court will [\*] not decree specific performance. In *Shapland v. Smith*, (1 vol. 75.) the Lord *Chancellor* was of opinion, I believe, with Master *Hett*, that the title was not good, and only threw out what he did as to doubtful titles, to break the fall of my opinion; but that is not the single case to show that where there is a cloud upon the title, the Court will not decree a specific performance. (2)

Lord Commissioner *Ashhurst* expressed himself of the same opinion; and said, if called upon, he should think the leases were confirmed, and that the case cited from Moore strengthened the opinion, but the Court has sufficient to decide upon; if the case is doubtful, it will not compel a purchaser to take a title which will lay him open to a suit, either at law or in this Court.

The Lords Commissioners were about to over-rule the exception, but Mr. *Solicitor* desired it might stand over; as over-ruling the exception would amount to an opinion that the title was bad.

It stood over, and was afterwards compromised by Mr. *Peters* consenting to confirm the leases.

† 21 Hen. 8. c. 15.

(2) See the Editor's note to *Shapland v. Smith*, 1 vol. 76., especially the reference to *Marlow v. Smith*, in the time of Sir *Joseph Jekyll*, 2 P. W. 201., et vide thereon per Sir *Wm. Grant* M. R., 2 Ves. & Beaumont, 149.

[ \*88 ]

OLDHAM *against* CARLETON.

(Reg. Lib. 1791. B. fol. 296.)

**MR. SIMEON** moved for a commission to examine witnesses in *Bermuda*, upon the usual affidavit, that the plaintiff is advised it will be necessary to examine witnesses in this cause, particularly to examine *William Smith Esq.* who is now resident, and controller of His Majesty's customs, in the island of *Bermuda*, without whose testimony the plaintiff is advised, and believes, he cannot bring this cause to a hearing.

**Mr. Hall** opposed this motion, as not being a motion of course, but as rather being a motion of expence and delay, and which ought to be made on special ground shewing in what [\*] points the evidence of the witness was material, and which was sometimes directed, and sometimes over-ruled, according to the circumstances of the case. To prove this he cited 1 Vern. 334., *Jessup v. Duport*, Barnardiston, 192., *Coote v. Coote* (*ante*, vol. i. p. 448.) Either in the pleadings or the affidavit, the grounds ought to be stated.

**Mr. Simeon**, in reply. It is true the witness's name must be stated, and it is so in this case; but, discharging the matter of old cases, it is impossible to state the evidence, as it would be tying down the witness to the matter stated, and might preclude material evidence being given. It is sufficient to state his name, that his evidence is material, and that he is abroad.

And the Register being of opinion that this was sufficient,

The motion was granted. (2)

(1) *Vide S. P. Rougemont v. R. Exch. Assur.* 7 Ves. 304. Upon the subject of examination of witnesses abroad generally, see *Cock v. Donovan*, 3 Ves. & Beames, 76., and the references in the note; 19 Ves. 372, 373., and the notes, &c. In *Noble v. Garland*, Coop. Ca. Ch. 222., and 19 Ves. 372. Lord Eldon C. decided, on consideration, that a commission to examine witnesses abroad might issue *before answer*, where the suit was merely for a discovery, &c. But it is observable, that there the time for answering was out, and further time had been obtained. Where an application was made previously to the expiration of the time for answering the Court refused it. *Cheminant v. De la Cour*, 1 Madd. Rep. 208.

(2) Upon the affidavit above-mentioned, for the examination of witnesses abroad, generally. R. L.

CALL *against* MORTIMER.

**MR. STRATFORD** moved that the defendant, being in contempt, and having been committed to the *Fleet* for non-payment of money, and still refusing to pay (1), should be committed a close prisoner. He cited Pract. Reg. in Chancery, 176. to show that this was the practice.

But the motion was refused.

(1) The motion was made by a Solicitor, whose bill had been taxed upon the defendant's own application, and the usual undertaking to pay what should be found due; but which he nevertheless persisted in refusing to perform. The defendant was only committed generally. From Reg. Lib. and a note of Mr. Cox in Lord Colchester's collection.

1792.

Lincoln's Inn  
Hall, 24th July.

Lords Commissioners  
Eyre, and  
Ashurst.

In order to obtain a commission to examine an evidence abroad, it is sufficient to state the name of the witness, that his evidence is material, and that he is abroad. (1)

[ \*89 ]

Lincoln's Inn  
Hall, same day.

Contempt.  
[It is not the practice to order a party to be committed as a close prisoner for non-payment of money.]



1792.

[\*90]

[Vide 8. C.  
2 Cox, 288.]Lincoln's Inn  
Hall, same day.[Under a com-  
mission for the  
examination of  
foreigners who  
cannot speak  
English, the  
depositions

must be taken down by an interpreter in English, and so returned. (1)]

## [\*] Lord BELMORE against ANDERSON.

(No Entry. But see the note.)

THE examination of witnesses, being foreigners, must be in *English*, and the interrogatories must, for that purpose, be translated into the language of the deponents, and their answer translated by sworn interpreters. *Omichund v. Barker*, 1 Atk. 21. In *Simmonds v. The Countess Du Barré* (*ante*, vol. iii. p. 263.) the answer was ordered to be taken in the defendant's language.

(1) This marginal abstract is from Mr. Cox's note. It appears from Lord Colchester's notes, that Mr. Dickens, the Registrar, ultimately coincided with Mr. Alexander's statement of the course of the Court, contrary to the apprehension of Mr. Milford, as stated in Mr. Cox's report; and drew up the order, with a direction that the interrogatories should be translated to the witnesses, and their depositions taken in English, and so returned.

Lord Colchester's notes contain a copy of the order as drawn up, which is as follows:—

Lord BELMORE v. ANDERSON, 24th July, 1792.

Form of order  
for examination  
of witnesses un-  
acquainted with  
the English  
language.

" Upon opening of the matter, this present day, the Right Honourable the Lords Commissioners for the custody of the Great Seal of Great Britain, by Mr. Milford of counsel for the plaintiffs, it was alleged that this cause is at issue; and it appears by the affidavit of Samuel Wayman Wadeson, the plaintiffs' solicitor, that the plaintiffs have several material witnesses to examine, who live in the kingdoms of Ireland and France, and that several of the said witnesses speak the French language only; and therefore it was prayed that the plaintiffs may take out two or more commissions for the examination of their said witnesses in France and Ireland, with the usual directions. Whereupon, and upon hearing Mr. Alexander of counsel for the defendant, and the said affidavit of the said Samuel Wayman Wadeson read, and what was alleged by the counsel for the said parties, their Lordships do order that the plaintiffs be at liberty to take out two or more commissions for the examination of their said witnesses in Ireland and France, returnable without delay; and that the defendant's clerk in court do, in four days after notice hereof, join and strike commissioners' names in each of the said commissions, with the plaintiffs' clerk in court, or in default thereof, that the said commissions be respectively directed to the plaintiffs' own commissioners. And it is further ordered, that the commissioners who shall execute the said commission, or some person to be sworn by them truly to interpret the same, to such of the said witnesses as can only speak in the French language, do interpret the interrogatories to be exhibited by the plaintiffs at the execution of the said commission to such witnesses, out of the English language into the French language, and also interpret the depositions of such witnesses who shall be examined thereon, out of the French language into the English language. And it is further ordered, that such interpreter be also sworn to keep the said depositions secret until publication shall duly pass in this cause."

[8. C. 2 Dick.  
767.]In Court  
before Lord  
Thurlow,  
7th May.Lincoln's Inn  
Hall, 26th July.Lords Com-  
missioners  
Eyre and  
Ashurst.

Writ de ventre

*inspiciendo* (2) against a married woman (whose husband had been near ten years abroad) on the application of a devisee (3), there being a limitation in the will, that if she had a male child within forty weeks after testator's decease it should take preference to the devisee: ordered to issue, but to lie in the office fourteen days, and if she submitted to an examination of midwives in the mean time, not to go; otherwise to issue.

In the Matter of MARTHA BROWN, *Ex parte* NEWTON WALLOP.

(1)

THIS was a petition of Newton Wallop an infant, (by John Earl of Portsmouth, his father and next friend) a devisee in the will of Henry Arthur Fellows Esq. deceased, praying that a writ *de ventre*

(1) (2) (3) See next page.

*inspiciendo*

*inspiciendo* of the said *Martha Brown* might issue, directed to the sheriff of *Middlesex*, or such other county as she might be in, and such proceedings be had thereupon, as by law in like cases are usual.

The petition stated that *Henry Arthur Fellows*, being seised in fee of lands, of the yearly value of 4000*l.* or thereabouts, made his will, bearing date 16th of *September*, 1789, and thereby, after bequeathing a legacy of 400*l.* to the said *Martha Brown*, described to be the wife or widow of *Ulysses Brown Esq.* late Captain in the Horse-Guards, but then either deceased, or, if living, resident in foreign parts, and which said *Martha Brown* then did, or then lately did reside in *Boulton-Street*, near *Piccadilly*, gave and devised all his real estates to *Thomas Warburton Esq.* and *John Churchill* clerk, their heirs and assigns, in trust, that they or the survivor of them or his heirs, should for twelve months next after his decease, receive the rents and profits of his estates, and thereout pay and apply the sum of 300*l.* for the maintenance and education of *Robert [\*] Henry Brown*, otherwise *Love*, whom the testator stated to have been born on or about the 13th of *September*, 1788, and baptized on the 18th of *November*, as the son of *John* and *Mary Love*, but whom the testator stated to be the son of *Martha Brown*, and should apply and dispose of the residue of such rents and profits, or the whole thereof, if the said *Robert Henry* should not be then living, in aid to, and as part of his said testator's personal estate; and at the end of twelve months from his decease, should by proper indentures of settlement, settle and assure the premises, in manner following; that is to say, as to the freehold part thereof, to themselves, or such persons as they should appoint, for the term of ninety-nine years, in trust, to secure to the said *Martha Brown* an annuity of 200*l.* a-year for her life, to her separate use, and as to all the premises, subject to the term, to the use of the said *Robert Henry* for life, *sans waste*; remainder to trustees to preserve contingent remainders; remainder to the first and other sons of *Robert Henry* in tail; remainder to the petitioner the Honourable *Newton Wallop*, second son of *Urania* Countess of *Portsmouth*, for life, *sans waste*; remainder to trustees to preserve contingent remainders; remainder to the first and other sons of the petitioner in tail, with the ultimate reversion to the testator's cousin *Robert Fellows*: and the testator did declare it to be his will, and direct that in case there should, at any time or times thereafter, either during his life, or within forty weeks after his decease, be one or more son or sons born of the body of the said *Martha Brown*, then subsequent to and in remainder, after the limitation to the first and other sons of the said *Robert Henry Brown*, otherwise *Love*, in tail male, and *precedent* to the limitations to the petitioner for life, the said devised premises should, in and by such settlement to be made by his said trustees, be limited to the use of such only son, or of the eldest of such sons thereafter to be born of the body of the said *Martha Brown*, either during the testator's life or within forty weeks after his decease as aforesaid, and of the heirs male of the body of such only or eldest son; with remainder to the second and other of such sons in tail; with remainders over to the petitioner for life, and to his first and other sons, and the several other remainders as before directed to be limited; and the testator gave and bequeathed all the fixtures, furniture, &c. of his house at *Eggesford*, and his house in *Hill-Street*, [\*] with its furniture, &c. to the same trustees, in trust, that in case the said *Robert Henry*, or such other person as should be first

1792.

Ex parte  
WALLOP.

[ \*91 ]

[ \*92 ]

- (1) The Editor cannot find any entry in R. L. upon this occasion.
- (2) As to this writ, see Mr. *Hargrave's* note to Co. Litt. 8. b.
- (3) It appears that the Lords Commissioners at first doubted whether the writ ought to issue at the instance of a devisee. See the report, 2 Dick. 768. See upon this case, per Sir P. Arden M. R., in *Kennel v. Abbott*, 4 Ves. 809.

entitled

1792.

Ex parte  
WALLQF.

entitled to the freehold and inheritance of the devised premises, under the limitations of the will or of the said settlement, should have attained the age of twenty-one, and be living at the end of twelve calendar months after the testator's decease, then to assign the bequeathed premises to the said *Robert Henry*, or such other person, to and for his own use and benefit, and in case such person should not then have attained the age of twenty-one years, then to sell the leasehold messuage and the furniture, and last mentioned premises, as well in *Hill-Street*, as at *Eggesford*, and apply and dispose of the money to arise from the sale, as part of the testator's personal estate; and to stand and be possessed of such parts as should not be sold, or the whole thereof in case no sale should be made, in trust for such person as, under the limitations of the said will or settlement, should first become entitled to the freehold and inheritance of the devised premises, and should attain the age of twenty-one years, and that the same, in the mean time, should be held and enjoyed as heir looms to the said devised premises; and the testator bequeathed the rest and residue of his personal estate to the trustees, in trust, upon the same contingency, to pay to such child or children attaining such age, the sum of 10,000*l.* each, as a portion, upon their respectively attaining such age, and in the mean time, to pay the interest for the maintenance of such child or children, with provisions in case of the death of such child or children: and in case there should be no such child, then in trust, to lay out the produce of such personal estate, in the purchase of freehold estates, &c. to be settled and conveyed to the same uses, or as near thereto as the nature of the estates would admit, and made the trustees executors of his said will.

The petition further stated, that the testator made a codicil to his will, dated 5th of *January*, 1791, wherein having recited the provision he had made of 10,000*l.* for the child or children which might be born of the body of *Martha Brown* as aforesaid; he stated, that, since the making of the said will, there had been two daughters born of the body of the said *Martha Brown*; one of the name of *Penelope*, the other of *Georgina Maria*, who had been baptized as the daughters of [\*] *John* and *Mary Love*: the testator declared by the said codicil, that there were two daughters born of the body of *Martha Brown*, and for whom he had directed a portion of 10,000*l.* to be raised. (4)

[ \*93 ]

That the said *Martha Brown* was the daughter of one Major *Baker*, late of the city of *Coventry*, fish-monger, deceased, and was born at *Coventry*, in the year 1743; that she, about the 19th of *May*, 1779, intermarried with *Ulysses Brown*, who was then an officer in the horse-guards, and cohabited with him till he went to the *East Indies*, about ten years ago, and where he has continued ever since; and it appears, by the last accounts at the *India House*, that he was at *Calcutta* on or about the 12th of *March*, 1791, and an officer in the military service of the *East India Company*:

That the said *Martha Brown* is a person of ill fame, and hath, for these last eight years, resided in different houses in *Curzon-Street*, *Clarges-Street*, and *Boulton-Street*, and kept several houses at a time, which she let out in lodgings to persons of ill fame, and particularly in the year 1791, and for some time prior to that period, she kept at one and the same time several houses, viz. one in *Clarges-Street*, one in *Curzon-Street*, another in *Boulton-Street*, another in *Britannia-Row*, *Camden Town*, and another at *Knightsbridge*; that she kept the two former till about *Christmas* last, when she was turned out by the land-

(4) It appears that these supposititious children were excluded from the legacies given them under such deception and mistake. See per M. R. in *Kennell v. Abbott*, 4 Ves. 809.

lord,

lord, and resided partly at one and partly at another, but principally at the house of an apothecary and man-midwife in *Great Portland-Street* :

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That said *Henry Arthur Fellows* was well acquainted with the said *Martha Brown*, and visited her frequently at her different houses, where she represented herself to him as being only a lodger; and that she, by various practices, obtained a great ascendancy over him, and pretended, and caused him to believe, that she had children by him; and to strengthen such belief, she produced to him the children of other persons, which she pretended were her children by him (5), and by such pretences obtained from him considerable sums of money for [\*] defraying the expences of her supposed lyings-in, and the maintenance of such supposed children :

[ \*94 ]

That the said *Martha Brown* never had any such children as she pretended, and particularly that she had no such child as *Robert Henry Brown*, otherwise *Love*; and that such child was the child of another person, and not of *Martha Brown*; and that she never had such children as *Penelope* and *Georgina Maria*; and if such children were produced to the testator as the children of said *Martha Brown*, such children or child were or was the children or child of some other person, and not of *Martha Brown*; and the said *Martha* hath, since the decease of the testator, produced to the parties' solicitor a child, whom she pretended to be the said *Penelope*, and which child is called *Anna Penelope Wells*, and is the child of one *Rebecca Wells*, otherwise *Fawkes*, with whom the said *Martha Brown* is in great intimacy; and which said *Rebecca Wells*, otherwise *Fawkes*, is now with child, and supposed to have been pregnant seven months; that the child so produced was before at nurse, at *Havering Bower*, in *Essex*, where two other children of the said *Rebecca Wells*, otherwise *Fawkes*, were also at nurse; and that *Martha Brown*, together with said *Rebecca Wells*, and others, went to *Havering Bower* to fetch such child, for the purpose of producing the same to the parties' solicitor as the child of the said *Martha Brown*, although they knew that such child was not the child of *Martha Brown*, but of *Rebecca Wells* :

That *Martha Brown* has frequently, since the death of the testator, informed the said *John Churchill*, one of the testator's executors, and other persons, that the said *Robert Henry Brown*, otherwise *Love*, was dead, and that he died in the life-time of the said testator, but refused to inform him where the said *Robert Henry* was buried, although she promised to procure him a copy of the register of his burial, but which she has not done, although repeatedly applied to for that purpose; but that the executors, in examining the testator's papers, found a memorandum in his hand-writing, stating that the said *Robert Henry* died the latter end of *September*, or beginning of *October*, 1791 :

[\*] That *Martha Brown* pretended to the testator, shortly before his death, that she had had born of her body a child, who she pretended had been christened by the name of *Benedictus Arthur*, or *Arthur* only, and which she pretended was born in the month of *August* last; and said *Martha Brown* afterwards declared that the said *Benedictus Arthur* was dead, and so declared since the death of the testator, and promised to get a certificate of his burial, which she has not done, though frequently applied to for the purpose; that said *Martha Brown* never produced any such child, and never, in fact, had any such child; and her assertion to the testator that she had had such child, was utterly false, and for the purpose of obtaining money from the testator :

[ \*95 ]

That the petitioner is advised, that he is become entitled to the estates

(5) See note (4) preceding page.

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WALLON.

devised by the testator, as tenant for life under the limitations in the said will, with the remainders therein severally limited. That the said *Martha Brown* has given out, and pretended to divers persons, that she is now with child, and several months gone with child, although she did, in *February* last, declare that she was then not with child, and although she had declared that she had not seen the testator since the month of *July*, 1791, and although her husband, *Ulysses Brown*, hath been resident in the *East Indies* since the year 1781, and is still resident there; and the said *Martha Brown* is of the age of forty-nine years, having been baptized the second day of *February*, 1743, old stile:

And although the said *Martha Brown* now pretends she is with child, the petitioner hath good reason to believe, and doubts not it will be made to appear, that the said *Martha Brown* is not with child, but is now attempting, in conjunction with other persons, and *Rebecca Wells*, who is now pregnant, to procure a child, whom she will pretend to be her child, and entitled to the said testator's estate, under the said clause in his will, and thereby attempt to deprive the petitioner of the estates to which he is entitled as aforesaid; and the petitioner apprehends it is the intention of the parties to produce the child of which the said *Rebecca Wells* is pregnant, if such child should be born alive, as the child of the said *Martha Brown*.

[ \*96 ]

[\*] The petitioner therefore prayed, for his security, and that of the several persons entitled under the limitations of the testator's will, that the writ *de ventre inspiciendo* of the said *Martha Brown* might issue as aforesaid.

The facts stated in the petition were very fully supported by affidavits, as far as they could be sworn to in that manner.

*Martha Brown*, in answer to this application, produced an affidavit, in which she swore that she was not with child.

The petition came on, by special order, before Lord *Thurlow*, on the 7th of *May*.

Mr. *Solicitor General*, Mr. *Mitford*, Mr. *Richards*, and Mr. *Martin*, in support of the petition, stated the petition and the affidavits upon which it was founded, and that Mrs. *Brown*, upon being served with it, had made affidavit that she was not with child, and contended that,

Notwithstanding such affidavit, the writ ought to issue; for, supposing a child to be produced within the time, that child might hereafter set up claims, and would not be barred by this affidavit; and if Mrs. *Brown* should then swear the child produced, to be her child, this affidavit would only go to her credit; and if there was other proof of her delivery, this affidavit would avail but little in contradiction of such evidence. Then the only objections to the issuing the writ are, as to the person applying, and that the woman against whom the application is made is a married woman. As to the first of these objections, it is certain that the writ at first only issued *ad quærelam veri hæredis*; the history of the writ is given by Lord *Coke*, 1 Inst. 8. b. But it has been held to lie in other cases, as for the *hæres factus*, where there is the same mischief; and, if so, it ought to lie for a devisee, who is considered by the statute as a *hæres factus*. In *Aiscough's* case, 2 Peere Williams, 591., it was considered as a writ of right, and that it lay for tenant in tail. The cases there cited are *Cro. Eliz.* 566., *Moore*, 523., and *Croke James*, 685., in which last case the woman was married to a second husband. There was also a case cited, of [\*] the *Attorney General v. La Roche*, where there was an examination by midwives. In *Aiscough's* case the writ did not issue, but the purposes of it were answered, as appears by the note in Peere Williams. In the case of *Grace Baron* a widow, there

[ \*97 ]

as an application to Lord *Kenyon*, then Master of the Rolls, for *de ventre inspiciendo*, she was the heir at law, but applied in the character of devisee; he recommended it to the parties to consent to which should produce the effects of the writ, but the writ issued, was an application to the Court of Common Pleas for the writ; they issued the writ for custody, but it turned out she was not with child. In *Ex parte Bateman*, at the Rolls, 30th of *Nov.*, 1784, *John Bateman* (the petitioner's father) being tenant in fee, with remainder to the heirs male of his body, remainder to his petitioner's mother) for life, with remainder to the heirs male of his body, remainder to himself in fee, made his will, dated 26th of *Sept.*, 1782, and thereby devised the premises to his wife for life, and after her decease to trustees to pay the rents and profits to the separate use of the petitioner for life, and after her decease, upon trust, until the petitioner should attain twenty-one years, to receive and apply the same as by the will was directed; that the petitioner was a mere devisee for life: it was objected that the petitioner must bring herself within the case of a *verus hæres*, in fee, or in tail. It was answered that it had been extended, upon the authority of the case, to other cases where there was the same mischief, and had been done with respect to the prerogative writ of *ne exeat regno*. The Master of the Rolls mentioned a case in the *Duncombe* family, and found no case in which it had been refused. Master *Holford* applied for, and had the writ in a case where he was entitled under the will, and in 1790 the writ was issued, by the present Master of the Rolls, against *Dorothy Ford*, upon the application of *John Blagdon*, for life, with remainder to his issue in tail, and several persons claiming as devisees over of the premises in question.

The only other objection is, that *Mrs. Brown* is the wife of an alien, but that man is abroad, and therefore [\*] is not injured, as she cannot have the comfort of her company, and besides the child can scarcely be his, therefore she is in the light of a single woman; and in other respects within the cases, no objection can arise from her situation as a married woman.

The petitioner is entitled to the security of this writ: it is impossible to protect him by any other means from the danger of a supposititious birth. The birth of the child must rest on other evidence.

*Chancellor.*

The case goes beyond the former ones, as the lands in question never came into the possession of the husband.

The general effect of the case is this, that the Court has considered the writ for the furtherance of justice, and that it ought to issue where the justice of the case requires it. Then, supposing the writ to be granted on the exercise of a sound discretion, as in the case of a writ of *ne exeat regno*, the question is, whether, on the chance of the widow bringing a child, the party entitled can come to have her confined. It shocks me to say, that where a stranger by will has limited an estate over, that this shall raise a right in the donee to have the wife of a stranger (the donor) inspected under this writ. In the Court of Common Pleas, the writ, if issued, might be set aside, *quia improvidè edita*. Is it proper for me to issue a writ under such circumstances?

It must extend to every case. Then must every woman who is tenant in tail, render herself liable to this writ? In the present case there is strong evidence to shew that this woman has practised considerable frauds on the will of the testator, by pretending to be with child.

Her pretending to be with child, is a reason that she could give no satisfaction than she has upon the subject; but, if it is a fixed rule

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*Wallop.*

[\*98]

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[ \*99 ]

rule to issue the writ, the Court will do it in other cases. This is to be sure a very strong case. I had rather look into the cases, for I cannot order the writ to issue on any less ground than this, that the Court has looked upon it as a [\*] writ, that it can issue for the furtherance of justice, wherever the obvious demands of justice require it.

The petition stood over, and the matter never was mentioned again whilst Lord *Thurlow* continued Lord *Chancellor*; but after the Great Seal was delivered to the Lords Commissioners, the petitioner presented to their Lordships a fresh petition, praying that the former petition might be set down to be heard before their Lordships, and that a writ *de ventre inspiciendo* of the said *Martha Brown* might issue, &c.

This application was supported by additional affidavits, to shew the probability that *Martha Brown* would endeavour to impose a supposititious child as her own, and to her declarations, since she made the affidavit upon the former application, that she was with child.

It came on upon the 26th of *July*, before Lords Commissioners *Eyre* and *Ashhurst*.

Mr. *Solicitor General* and Mr. *Miford* argued much to the same purpose as before, on the urgency of this case for the issuing of the writ, and compared this writ with the writ of *ne exeat regno*, which, though originally a prerogative writ, now issued for the subject, wherever there was an equitable demand, in order to enforce giving security.

Lord Commissioner *Eyre* at the close of the argument (with the concurrence of Lord Commissioner *Ashhurst*) ordered the writ to issue, but to lie in the office for fourteen days, and if, within that time Mrs. *Brown* chose to submit to an examination by two midwives, to be appointed by the petitioner to inspect and examine her, by such an examination as they shall think necessary, whether she is pregnant, then the writ not to go, till further orders; otherwise the writ to issue.

[ \*100 ]

*Lincoln's Inn*  
*Hall*, 31st Oct.

Lords Com-  
missioners  
*Eyre*, *Ashhurst*,  
and *Wilson*.

A sum certain  
given for costs  
where small.

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[\*] WILDING against WILDING.

(No Entry.)

MR. *STRATFORD* having made a motion at the Seal yesterday, the effect of which was allowed, but, on a deficiency of notice, his client was ordered to pay the costs of the application, now moved that a sum certain should be ordered for costs, to avoid the expence of taxing costs, upon a sum that must be trifling.

The Court ordered twenty shillings to be paid as the costs.

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*Lincoln's Inn*  
*Hall*, 3d Nov.

Lords Com-  
missioners  
*Eyre*, *Ashhurst*,  
and *Wilson*.

Interest or-  
dered to be  
paid to the  
wife, husband  
being in a state of imbecility of mind.

BIRD against LEFEVRE.

(Reg. Lib. 1791. A. fol. 628. b.)

THIS was a petition, that a fund in court belonging to the plaintiff, or the interest of it, might be paid to the plaintiff's wife, for the maintenance of himself and his family, he being in a state of mind,

which

which, though not amounting to lunacy, was of too great imbecility, in consequence of a paralytic stroke, to do legal acts.

And, it appearing to be for the benefit of the family, that the interest should be so paid, it was ordered to be paid to her from time to time.

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BIRD  
against  
LEFEVRE.

BOURDILLON *against* ALLEYNE [ALLAIRE (1)].

(No Entry.)

A COMMISSION had been executed abroad.

Lord Commissioner *Eyre* said, that in the Exchequer, when a commission was executed abroad, the person who takes it out and returns it, must make affidavit that he received it from the Commissioners.

He ordered in this case, that the *Solicitor* should make an affidavit as to the sending it out, and receiving it back.

Lincoln's Inn  
Hall, 3d Nov.

Practice.  
Commission  
executed  
abroad.

(1) This appears to be the defendant's real name, from other entries in R. L.

[\*] MICHAELMAS TERM,

[ \*101 ]

33 Geo. 3. 1792.

*Ex parte* WARNER.

(Reg. Lib. 1792. B. fol. 19. b.)

10th November.

Lords Com-  
missioners  
*Eyre, Ashurst,*  
and *Wilson.*

A PETITION by four infant children of *John Pilgrim Warner* and *Maria* his wife, praying that it might be referred to one of the Masters to approve of a proper person to have the care of their persons, and superintendence of their education, during their minorities, and that their father might be restrained from removing them from the several schools and situations where they are now placed, and from using or employing any means for that purpose.

Father re-  
strained from  
exercising  
paternal au-  
thority over  
children, by  
order of the  
Court. (1)

The petition stated the marriage settlement previous to the marriage of the father and mother, whereby money in the funds was conveyed to trustees to the uses mentioned, in which the petitioners had certain interests; that the husband had afterwards become a bankrupt; that a legacy of 2000*l.* having been left to the wife, a suit had been exhibited by his assignees for the legacy, and an order was made, by which it was referred to the Master, to enquire whether there was any settlement on the marriage, and that the assignees should be at liberty to make proposals for a settlement; that the Master reported no settlement had

(1) *Vide* S. P. *Cruise v. Hunter*, in the Editor's notes to *Powell v. Cleaver*, *ante*, 3 vol. 500. (S. C. also 2 Cox, 242.) and *De Manneville v. Somer*, 10 Ves. 52. &c.



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*Ex parte*  
WARNER.

[ \*102 ]

been made as to the 2000*l.* legacy, and that the assignees had proposed that 1000*l.* should be paid to them, and the residue settled to the separate use of *Maria* the wife for life, and after her decease, in trust for the children of the marriage who should be then living, in equal shares, and that he had approved the proposals; which had been ordered: that *Maria* had children, the petitioners, by her husband, and that three of them had been placed by their mother, [\*] and others, her relations, in different schools, and the youngest was maintained by the mother, and that the father who claimed to be their guardian, by his cruel behaviour to the mother, had compelled her to exhibit articles of the peace against him, upon which he had been arrested and confined in *Newgate* for want of bail, which he had at length procured; and that he had not, before he was arrested, any settled place of abode, and was wholly unable to provide for the petitioners, and had lately endeavoured to remove one of the petitioners by force, and still threatened to remove him, and the other petitioners from the schools in which they had been placed, and to take them into his own custody; and that they are advised that their present and future welfare will be materially injured in case their father should be permitted to use his paternal authority over them.

The petition was supported by the affidavit of the mother to the same effect, and of other deponents, her relations, who were at the expence of maintaining the petitioners, that they were of opinion the father was a very unfit and improper person to have the care and management of his children.

Mr. *Solicitor General* and Mr. *Abbot*, in support of the petition, stated that Lord *Thurlow* had been of opinion, that the Court could interpose in this way, to restrain the exercise of paternal authority over a child, who was a ward of this Court. That he had been of this opinion, in the case of Mr. *Powel* of the *Pay Office* (*Powel v. Cleaver*, ante, vol. ii. p. 499.) and that he had done it in a subsequent case of Mr. *Orby Hunter*, (2) who was restrained from taking his son, a ward of this Court, out of the care of his mother, who had been at the expence of his education, the father being abroad, and in embarrassed circumstances.

Lord Commissioner *Eyre* (the other Lords Commissioners assenting) directed the order to issue, as prayed by the petition.

(2) Reported, ante, 2 vol. 500., Editor's note, and 2 Cox, 242.

[ \*103 ]

[\*] The ATTORNEY GENERAL at the Relation of RICHARD WHITWORTH, Esq. - - - - Plaintiff.

AND

[S. C. 2 Ves.  
jun. 1.]Lincoln's Inn  
Hall, 13th Nov.  
[and 11th Dec.]Lords Com-  
missioners  
*Eyre, Ashurst,*  
and *Wilson*,Where an  
estate is given  
to a charity,  
and the rents  
are afterwards  
increased, there is no resulting trust for the heir at law, but the charity shall have the advantage of the surplus rents. (1)

The Master and Wardens of the Company of Haberdashers of the City of *London*, Governors of the Possessions and Revenues of the Free Grammar School of *Newport, Com. Salop*, of the Foundation of WILLIAM ADAMS, and RANDLE TONNA Defendants.

(Reg. Lib. 1792. A. fol. 321. b.)

THE information filed in *Trinity* Term, 1787, stated (among other things) an indenture, bearing date, 27th of *November*, 1656, made between *William Adams* of the first part, and the Company of Haberdashers

(1) See *Ex parte Jortin*, 7 Ves. 340., and the late case of *The Attorney General v. Mayor*

dashers of the other part, reciting that his late Highness Oliver, Lord Protector of *England, &c.* by letters patent dated the 7th of the said *November, 1656*, upon the petition of said *William Adams*, had ordained, that for ever thereafter there should be in the said town of *Newport*, a free grammar school for education and instruction of children and youth, which should be called the Free Grammar School of the foundation of *William Adams*, and that one master, and one usher should be there for ever; and for the better effecting the pious intention of him the said *William Adams*, and that such lands, tenements and hereditaments, as should or might be purchased, granted, or assigned, to so good a work, might be better governed, as well for the continuance and maintenance of the said Free Grammar School, as the performance of such said pious and charitable uses as the said *William Adams* should direct and appoint, his Highness did, by his letters patent, will and grant for him, and for his successors, that the master, &c. of the Company of Haberdashers, and their successors, should be called governors of the possessions and revenues of the said school, and should be a body politick and corporate by that name; and by the same name should have perpetual succession, and should have a common seal, and should be persons able and capable in law to purchase and possess any manors, messuages, lands, tenements, hereditaments, [\*] goods and chattels whatsoever, of any person or persons whatsoever, to them and their successors in-fee and perpetuity, or otherwise howsoever, for the maintenance of the Free Grammar School aforesaid, and other charitable uses, not exceeding in the whole 300*l. per annum*, the statute for not putting lands in mortmain, or any statute notwithstanding, and that they and their successors might plead or be impleaded, &c.; and his Highness granted unto the said *William Adams*, full power during his life, to order and govern the said Free School, and to appoint pious and discreet persons to be schoolmaster and usher, and to remove them at his pleasure, and as they should become void by death or otherwise, to nominate fit persons to the said places; and also reciting that the said *William Adams*, by indenture dated the 26th of the said *November, 1656*, between the said *William Adams* of the one part, and the said master, &c. of the other part, reciting the said letters patent, did grant, bargain, and sell, unto the said master, &c. all that capital messuage or grange, called *Knighton Grange*, in *Com. Salop*, with the appurtenances, to hold to the said master, &c. for ever; it was witnessed and agreed between the parties, that the said *William Adams* should, *during his life, receive and dispose of the rents and profits of the said premises, to the payment of the several yearly sums therein aftermentioned, and should have power to let the land, and to make leases thereof, reserving the rent of 175*l. or more*, all taxes paid; as also to cut down and carry away all timber, or any wood or underwood, and to dispose thereof by will or otherwise, and, after his decease, that the said master, &c. and their successors should yearly, from time to time, for ever, out of the rents and profits of the premises, pay the several yearly sums therein mentioned (that is 20*l. a-year* to a preacher, and other sums for a schoolmaster and usher, and for four exhibitions, and other stipulated uses, and he gave several directions for the conduct of the said charity,) and it was thereby provided and declared, that the said governors or their successors, should not be charged with the said yearly payments, or any of them, unless they should receive the rents and profits, but with so much only as they should receive, and*

1792.

ATTORNEY  
GENERAL  
against  
The Haberdashers'  
Company,  
and TONNA.

\*104.]

*Mayor of Bristol*, 3 Madd. 319. *et seq.* with the various authorities there collected; especially Lord C. J. Holt's argument in the *Mayor of Coventry's* case, inserted *ibid.* p. 353. from MS.; and that case on the Appeal in Dom. Proc. 7 Bro. P.C. 236. (octavo ed.)

1792.

ATTORNEY  
GENERAL  
against  
The Haberdashers'  
Company,  
and TONNA.  
[ \*105 ]

that they might deduct all such charges as should be expended in recovering the rents, &c., and that if any loss should happen, that they might abate and deduct out of the charity-funds. The information further stated, that the said master, &c. were incorporated, [\*] and the settlements of the said *William Adams* confirmed by an act of parliament of 12 Car. 2., and that the said *William Adams* made his will, dated 6th of July, 1660, and thereby (after divers bequests) and further reciting that he had formerly conveyed divers lands and hereditaments to the said master, &c. to the uses in the conveyances mentioned, but *had reserved to himself power of disposing of the woods*, he thereby gave the said woods to the said master, &c. and their successors for ever, upon trust, that if, at any time after three years, they should be certified, by writing under the hands of certain persons, that a very good price would be given for the said wood, then they the said master, &c. should give authority to the said persons to sell so much of the said wood, as should raise, besides the charges of cutting, &c. the sum of four or five hundred pounds, and he thereby willed that all such money as should be so raised by sale of the said woods, should be by the said master, &c. laid out in the purchasing and settling lands, &c. as near *Knighton* as conveniently might be, upon the said master, &c. in fee, and that the same hereditaments so purchased, and the rents thereof were intended by him for the better security, and the more sure payment of the several sums of money, payments, and uses as were before appointed by the said indentures.

The information further stated that *William Adams* died soon after the date of the will, without revoking or altering the same; and that, at the time of his death, the premises mentioned in the indenture of the 27th of November, 1656, were let on long leases, at the yearly rent of 175*l.* which is the exact amount of the several charitable donations mentioned in the indenture: that the master, &c. as governors, entered into and still are in possession of the premises and in receipt of the rents; that, some time after the death of the donor, they cut down a large quantity of timber, and sold the same for a considerable sum of money, and applied part thereof in the purchase of an estate at *Woodsoves com. Salop.* and converted the remainder to their own use. (2)

The information also stated that several of the exhibitions had become vacant, and the company had applied the money arising therefrom to their own use:

[ \*106 ]

[\*] That the leases under which the premises were let at 175*l.* a-year expired 25th March, 1784, and that the company have granted new leases, at the advanced rent of 400*l.* a-year, and have ever since received such advanced rent, and that they have cut timber, and sold the same, but have not laid out the money in the purchase of lands, as directed by the will, but that the same remains in their hands; and charging that the company were not entitled to take the increased rents to their own use, the information prayed that the charitable intentions of the said *William Adams* might be carried into execution, and an account taken of the money now in the defendants' hands, and of the timber cut by them, and of the money received from the sale thereof; and that such money as should be found remaining in the defendants' hands, might be paid by them, and applied in such manner as the Court should direct, in augmentation of the several charities mentioned in the indenture of the 27th of November, 1656, or otherwise, as the Court

(2) It appears this was not the first occasion when complaints had been made against the Company for mismanagement of the trust. They had grossly misconducted it up to the year 1700, &c., for which the trustees were made answerable out of their own estate, with costs of suit. Vide 2 Bro. P. C. 370., octavo ed.

should

irect, and according to the intentions of the said *William* and that the surplus rents hereafter to become due, together timber and other trees now growing thereon, might be declared to the charities, and to be applicable in the first place in the charity estates, and for such other purposes relating as there shall be occasion, and then in augmentation of the and for proper directions.

formation had been at first filed against the company only, as (3,) but at the hearing, 4th of *February*, 1789, it was referred to the Master to enquire who was the testator's heir at law, and on the *May*, 1791, the Master made his report, that, from the various and documents laid before him, he conceived *Randle Tonna* to be heir at law of the said *William Adams*.

his, a supplemental information, making the defendant *Tonna* was filed; to which the defendant *Tonna* put in an answer, by which he claimed to be entitled as heir at law, to the surplus rents of *Woodseves* beyond the yearly sum of 175*l.* given to the purposes before-mentioned, and to the money received by the timber cut down, and to the other profits which might have been ] and to the timber, trees, quarries, mines, and minerals now and being on the premises, and to all estates since purchased, and to the rents thereof, as not having been disposed of by the indenture of the *November*, 1656, or by the will of *William Adams*, or by any act of his life-time.

the cause came on now to be heard before the Lords Commissioners. The *Attorney General* for the plaintiff.

The object of this bill is to obtain the increase of the fund for the timber over and above the rent of the land mentioned in the bill. It is on the deed and will of *William Adams*, and the prayer of the bill is, that the charitable intentions of the testator may be carried into execution, and an account taken of the money in the defendants' hands, particularly in respect of the vacancies of the exchequer, the office of usher, and of the increased rents and timber cut down of the money arising from the sale of the timber cut down; the money found in the defendants' hands, may be paid and in such manner as the Court shall direct, in the augmentation of the charities mentioned in the indenture of 1656, or otherwise, as the Court shall think proper, according to the intentions of *William Adams*; the surplus rents hereafter to become due, together with the timber and other trees growing thereon, may be declared to belong to the charities, and to be applicable thereto.

There are two claimants against the charities, the haberdashers' company, (but this claim was immediately abandoned) and the heir at law, who claims the surplus rents as a resulting trust for him. The question is, Whether the testator's intention was, that the whole rents should go to the charities? All cases of this kind resolve themselves upon the intention of the donor.

In the present case, the whole rents and profits were in the first place reserved to himself, and then were to be distributed to the charities; and he was to dispose of in his life-time, and after his decease to the charities. The company were [\*] nominated governors of the possessions and revenues of the free grammar school, which cannot be intended that it should be a gift to the company charged with the management, with a resulting trust for heirs at law whom he does not name. He reserves to himself the administration of the whole during his life, and clearly means the whole afterwards to go to the

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[ \*108 ]

(3) *Vide* some proceedings in the suit, 1 Ves. jun. 295.

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 and TURNER.

charity; that is that the same property over which he had dominion during his life, should go to the charities. He was to have power to receive and dispose of the rents whilst living, and to make leases, reserving the rent of 175*l.* or more; which shewed that the rents could not be correctly ascertained; and the indefinite expression or more shewed that he thought the rents might amount to more than the 175*l.* a-year. He speaks throughout of the estate, as a whole thing producing rents and profits, and reserves to himself a power of cutting timber. In the conclusion, he provides that the company shall not be chargeable with the rents, unless they should receive them, and that if there should be a loss, the charity should suffer it. He thought there might be a defalcation of the rents, and provides for the abatement. This shows he had in contemplation an entire thing, which might produce more or less than 175*l.* a-year. He then provides, by the will, that if, at any time after three years, a good price could be got for the wood, the master and wardens, for the time being, might authorize persons to cut timber, to raise four or five hundred pounds to be laid out in the purchase of lands, to be settled in fee, for the better security of the payment of the sums of money before appointed. Here it is manifest, that thinking the rents might not be sufficient, he directs 500*l.* worth of land to be purchased to secure them. In all the cases where the expressions have come up to those in the present case, the words *rents and profits*, have been considered, as shewing that the whole was to pass, and to exclude every idea of a surplus: *a fortiori*, where the donor himself has an idea that the whole may not be sufficient for the purpose, that must exclude every idea of surplus. But we are not driven in this case to so narrow a construction; for, even in cases where the donor distributes the entire sum out in charities, it has been held that if there was a surplus, it passed to them. In the case of *Thetford School*, 8 Co. 130. b. the value of the lands at the time was 35*l.* a-year, which the testator made a special distribution of to charities, [\*] amounting to the sum of 35*l.* a-year, afterwards the lands became of the value of 100*l.* a-year, it was resolved that the surplus rents should be applied to the same uses; for it appears by his distribution of the profits, that he intended the whole should be employed in works of piety and charity, and nothing should be converted to the private use of the executors, or their heirs: and this resolution is grounded on evident and apparent reason, for as if the lands had decreased in value, the preacher, &c. should lose; so when the lands encrease in value, *pari ratione*, they shall gain." That observation applies very strongly to this case, and indeed the whole case is very similar to the present. In *Arnold v. The Attorney General*, Shower's Parl. Cases, 22. the testator devised the manor of *Furthoe* to trustees, to pay particular sums to charities: the surplus was ordered to go in augmentation of the charities; and the decree was affirmed: and that case rests it upon the intent of the donor. And here the intent is equally manifest; from the provision that the rents which should fail should fall upon the charities. In the *Attorney General v. Mayor, &c. of Coventry* (4), 2 Vern. 397. a reversion in fee of lands, let on leases, on which 70*l.* was reserved, was granted to the corporation of *Coventry*; 400*l.* of the purchase-money was paid by the corporation, and 1000*l.* by Sir *Thomas White*; but, in the grant, the corporation were said to be the purchasers; and it was by the deed declared, that the 70*l.* a-year, should be applied to several charities: afterwards the value of the lands were greatly raised, but the surplus rents had been always received by the

[\*109]

(4) See the argument of Lord C. J. Holt in this case, stated at length from MS., 3 Madd. 353. &c., and the report on the Appeal in Dom. Proc. 7 Bro. P. C. 235. octavo ed.

corporation;

corporation; certain sums only having been given to the charities out of the lands, and not the lands themselves, the corporation was decreed to be entitled to the surplus: but it appears that that decree was reversed by the House of Lords (5), 2 Bro. P. C. 236.

Here, the heir at law sets up, that, previous to the indenture, *Adams* had purchased estates in *Flintshire*, in the names of trustees, and had appointed them to the charities; but that, finding the profits thereof fall short, he purchased the present estates, and filed a bill in Chancery against his trustees, to have this estate substituted, and the estate in *Flintshire* discharged; and obtained a decree. But it appears by that suit, that the rent of the *Flintshire* estate was to have been applied out and out, therefore the substituted estates were to be so likewise; and it is [\*] recited by the testator in his bill, that the substituted lands amounted to 200*l.* a-year, so that he knew there was a surplus, and he had adverted to possible deficiencies, he considered it subject to losses; because although he had obtained an act of parliament, excepting it from certain charges, any annual bill not taking notice of those exceptions, would bind it. Had he intended a surplus for the benefit of his heir at law, he would have given it to him, subject to a charge of 175*l.* a-year. Upon the whole, the form in which it is done, and the expressions he has used, and his anxiety in procuring a second estate that should be sufficient, shew his intention to pass it to the charitable use.

Mr. *Graham* and Mr. *Cox* for the heir at law. It is not necessary to rest it upon any intention in favour of the heir at law; he claims all that is not given away. Whether he was or was not in contemplation, he claims: he, even, claims, against the intention of the testator, and this is the case, as well of equitable, as of legal estates.

*Adams*, previous to the conveyance, was seised in fee of the *Knighton* estate. By the indenture of the 26th of *November*, he clearly conveys the legal estate to the company; and, by the indenture of the 27th, he declares the uses of it.

The question is, what he has done with the equitable estate; and this, if the uses do not exhaust the estate, would result to the heir, unless it is clear that, wherever a legal estate is given to trustees for a charity, the whole is disposed of, and the heir barred of his equitable claim.

The cases only afford a rule of construction; they are no way material, but as they shew the intent of the testator. In those which have been cited, the value of the estate was, at the time, exactly what was given to the charity. In the present case, the donor knew that the value of the estate was more than he intended for the charity. If a testator means to make further provisions for charitable purposes (which perhaps he might here) but does not perform that intention, the heir must take the residue.

[\*] There most certainly are cases, where, if the testator disposes of all the rents of an estate, it is the same as if he gave the whole of the land; but, if a man having land of the value of 40*l.* a-year, give 40*l.* a-year out of it to a charity, and the land is improved to 100*l.* a-year, the charity shall only have 40*l.* 2 Vern. 400. The letters patent are in this case not very material, as they were prior to the conveyance, and he might change his intention. By the deed of the 27th of *November*, 1756; (the legal estate being then in the company) the purposes are very clearly pointed out; more than 175*l.* a-year was not to be expended; for this purpose when the company visited, there was to be no election; if the surplus was to be for the charity, the expence might have been thrown upon the surplus; all he was doing by the deed of the 27th of

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deners'  
Company,  
and Towns.

[\*110]

[\*111]

(5) This is a mistake, *Vide* 7 Bro. P. C. 235. &c., octavo ed.

*November,*

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against  
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Company,  
and TENNA.

*November*, was declaring uses to the amount of 175*l.* a-year. It rested with him, whether he would let the estate at 175*l.* a-year or more; at that time he had not made up his mind, whether he should charge it with more; and if the express trust does not extend to the whole fund, the residue must remain in the donor. With respect to the cases. The case of *Thetford School* is open to the observation that is made upon it by Lord Hardwicke in the *Attorney General v. Johnson* (Amb. 190.) that the idea of a resulting trust for the heir at law, was very little known at that time: the Court thought it a question merely between the charity and the feoffees. Besides there the whole was most expressly given, but here it is only to pay 175*l.* a-year out of the rents and profits. In the case of *Arnold v. The Attorney General*, there was a clear intention to pass the whole. In the case of the corporation of *Coventry*, the only question was, whether they were mere trustees. Another question arises on the will, he had reserved a power of disposing of the timber; then he, by the will, directs the money to be produced by the sale of it, to be laid out in a purchase; but he has done nothing more than direct the land to be purchased, to be a security for the payment of certain sums of money; he has not disposed of the land itself.

Mr. Mansfield and Mr. Lloyd, for the company. The heir at law in this case, can take nothing from the trustees. The first view of the donor was the founding the school, afterwards, he wished to extend the charity to some other uses. The power to lay out the money to be produced by the sale of the timber, [\*] was merely for better securing the former uses. It was a larger fund in the hands of the trustees for the same uses. It is quite a new idea that there is a resulting trust in such cases as these. Where a man makes a partial distribution, there the residue results; but never where the whole is given, and the uses do not extend to the whole amount. The Court have adopted a rule since the decrease of the value of money, and the increase of rents of land, to make the objects as nearly adequate as may be to the intention of the testator. The whole here is given to the trustee; by reserving particular powers to himself during his life, he excludes the idea of any thing resulting. The company have been in possession ever since: they state what they have in their hands, and the uses to which they have applied the funds, and consider themselves as in possession, merely for the benefit of the charities.

Lord Commissioner Eyre. I cannot bring my mind to think there is any resulting trust for the heir at law, according to the general intent of the parties, to be gathered from both the instruments taken together. The import of the first deed was to convey the whole estate to the charity. If nothing more had been done, all that would have been necessary, would have been to come here to have a plan formed for carrying it into execution; but the second deed shows it to be his intention, to have the disposition of the rents and profits, for life, making the payments to the charity; and that he might make leases, provided he reserved rents sufficient for the purposes of the charity. He did afterwards make a lease of it, to his relation, reserving 175*l.* a-year. When these objects were satisfied, the trusts were secured, as far as it was confined to 175*l.* a-year; and then the general trusts in the first deed were to be executed. With respect to the heir, there could be no intention in his favour. It is argued on the ground of omission, because there is nobody else to take: but, here, by the deed, there is somebody to take. In the usual case, the surplus results to the charity; it is not necessary to look further for objects: it must be applied for the benefit of the charity, either to extend it to new purposes, or, which is better, to increase the present provisions. The charity being limited for a time, the accumulation must go to the purposes of the charity. There is no such

[ \*112 ]

[\*] necessity that we must decree it to the heir for want of objects, therefore there is nothing resulting to him. Therefore there must be an account of the rents and profits, &c. The other Lords Commissioners assenting, a decree was pronounced accordingly. (6)

The Court declared "that there was no resulting trust in the charity estates in question for the defendant R. T. the heir at law of the testator." R. L. folio 325. The minutes of the decree having omitted to allow the heir at law the expences he had subjected to in proving his title, they were afterwards varied in that respect by directing that the heir at law "should be paid the costs, as between solicitor and client, which he had been put to by proving himself to be such." *Vide postea*, 178. et R. L. A. fol. 149. b.

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ATTORNEY  
GENERAL  
against  
The Haber-  
dashers'  
Company,  
and Towns.  
[\*113]

## WATTS against MARTIN.

(Reg. Lib. 1792. B. fol. 3. b.)

1. *Solicitor General* moved that an estate which had been sold before the Master, in separate lots, might be again put up to sale in one lot, a considerable advance having been offered, and the Master's order having only been confirmed *nisi*. The residuary legatee and trustee appeared and consented. The purchasers of the lots opposed the motion. (1) The Court allowed the hardship of the case, but observed, that as the residuary legatee and the trustee consented, they could not refuse the sale, as the former purchasers might claim and be satisfied the expences they had sustained in consequence of the former sale before the Master. (2)

15th November.

Sale. Bidding opened [on terms of paying the former bidder all costs, charges, and expences, to be settled by the Master. (2)]

"Mr. Milford, (now Lord Redesdale), for the former purchasers opposed the motion, alleging the injustice upon them, after having incurred expences in surveys, &c. In general cases the biddings were opened because some person might still bid better; whereas here they were precluded if the whole should go in one lot: and that this had been done at first, none of those individual bidders would have offered, or added their time or money on the surveys, &c. The *Solicitor General* (now Lord Eldon) said there had been a precedent twelve years before." From Lord Colchester's

It appears, from R. L., that the Court (adverting to the expences of the surveys, as stated in Mr. Milford's argument in the preceding note) directed the party thus engaged "to pay the costs, charges, and expences, occasioned by the said biddings, to be paid by the Master in case the parties differed."

[\*114]

[S. C. 2 Ves.  
jun. 9.]

17th November.

Lords Com-  
missioners  
Eyre, Ashurst,  
and Wilson.

Ex parte WHITE [or WRIGHT], in the Matter of WHITE [or WRIGHT] (1), a Bankrupt.

The petition of the bankrupt stated the commission of bankruptcy in 1779, that the creditor proved a debt, and in 1785 received a dividend; afterwards in 1792 he brought an action against the bankrupt, and received a dividend, to proceed at law against the bankrupt or his bail, must refund the dividend.

A creditor  
having proved  
under a  
commission

(1) *Vide* S. C. 2 Ves. jun. 9. under this title.

and



1792.

Es parte  
WHITE.

and held him to bail, and took an assignment of the bail bond. The prayer was, that the creditor might not proceed at law against the bail, he having received a dividend under the commission, or that such order might be made as the Court should think fit.

Mr. Stanley, on behalf of the creditors said, that upon repaying the dividend he might proceed at law.

Mr. Abbot in support of the petition, to shew that though this rule might apply as to the bankrupt himself, it would not as to his bail, cited *Aylett v. Harford*, 2 Blackstone, 1317.

Lord Commissioner Ashhurst. Having acquiesced three years, I think he ought to be bound.

Lord Commissioner Wilson. It seems to be the admitted principle, that upon refunding the dividend, he may proceed, and this case seems within the rule.

Lord Commissioner Eyre. I think it must be bound by the general rule.

The common order was made, that, on refunding the dividend, he might be at liberty to proceed.

[\*115]

[Vide S. C.  
2 Ves. jun. 11.]

20th November.

Lords Com-  
missioners  
Eyre and  
Ashhurst.

Great length  
of time raises  
a presumption  
that a legacy  
has been  
paid. (1)

Where an  
estate is charged  
with debts and  
legacies, a cre-  
ditor by bond  
is not an ad-  
missible witness  
that the [debts  
and] legacies  
are not paid.

## [\*] JONES against TURBERVILLE.

(Reg. Lib. 1792. A. fol. 35.)

LEWELLIN WILLIAMS made his will, dated 25th of October, 1748, and therein gave "to his daughter *Elizabeth Williams* the sum of 200*l.* to be paid her within one year after his decease, by his executors therein-after named." He also gave several other charitable and pecuniary legacies, and gave the residue of his real and personal estates to *Richard Turberville* and *Richard Powel*, for payment of debts and legacies, and, after payment thereof, he gave the same to his son *Philip Williams*, and appointed *Turberville* and *Powel* executors.

By indenture, dated the 31st of October, 1748, said testator conveyed to *Turberville* and *Powel*, and their heirs, &c., premises, situate in *Broughton Gifford, Wilts*, in trust, to pay the debts and legacies of the said testator, in case his personal estate should not be sufficient; the personal estate to be first applied: and after raising sufficient to pay the same, to the use of *Elizabeth Williams* (his wife) for life; remainder to the use of *Mansell Williams* (the younger son) in fee. *Llewelin Williams* the testator died the 17th of November following, leaving *Elizabeth* his wife, and *Philip* and *Mansell* his sons, and *Elizabeth* his daughter, (who afterwards married the plaintiff,) surviving him. The executors proved the will. *Elizabeth Williams* the widow, who was entitled for life (subject to the payment of debts and legacies) to the estate at *Broughton*, died the 23d of July, 1775, *Philip* the son and heir (a minor, at the death of his father) took the principal part of his real estate under a settlement, and entered into possession of a leasehold estate, under the idea that it was freehold; and having, by will, given all his personal estate to the defendant *Catherine*, died 1st of September,

(1) The report in 2 Ves. jun. 11. &c. is much preferable. Upon the presumptions arising from length of time, &c., vide the Editor's notes upon *E. Deloraine v. Brown*, ante, 3 vol. 363. et seq. Et vide *Herey v. Dinwoody*, postea, 257. See in particular the recent case of *Chalmer v. Bradley*, 1 Jacob & Walk. 51. et seq. 59, 60. &c.

1772, leaving the defendant *John Williams* (a minor, the son of his brother *Mansell*) his heir. *Mansell Williams*, the younger son of the testator (to whom his mother had made over her interest in the *Broughton* estate, subject, &c.) received the rents till his death, 23d of *July*, 1771; he left a widow, *Jane Williams*, and *John Williams* his heir at law, and heir to the testator; *Jane Williams* received the rents of the trust estate, in right of her [\*] son *John*, till he attained his age of twenty-one in 1778, and then *John* entered into possession, and has remained so to the present time.

This was a bill filed by the plaintiff *Jones*, as administrator of his late wife *Elizabeth* the testator's daughter, on behalf of himself and the other unsatisfied pecuniary legatees of the testator, against the widow and executrix of *Turberville*, the surviving trustee and executor of the testator, the representatives of *Powel*, and the *Williamses*, for the legacy to his late wife, and for proper accounts, and that other unsatisfied legatees who should come in and contribute to the suit, might be paid their legacies.

The defendants, in their answers, relied upon the length of time that had elapsed, as a presumption that the legacy had been paid.

The evidence that was read, was of declarations of *Elizabeth Jones*, that her legacy had not been paid, and of other persons interested in the subject.

*Joanna Williams*, the principal witness, spoke to a declaration of *Philip Williams*, that the legacy had not been paid, and that he blamed his brother *Mansell* for its not being so; but in the same deposition she said that there was a bond debt due from the estate of the testator to her and her sister, with a great arrear of interest which remained unsatisfied, and she believed there were other bond creditors unpaid.

This evidence was offered as raising a presumption that the legacies were not paid; but being objected to by the defendant's counsel, the Lords Commissioners thought it inadmissible, as paving the way for the recovery of her own demand.

Mr. *Mansfield* and Mr. *Stratford* for the plaintiffs argued, that if length of time raised a presumption that legacies had been paid, circumstances might be adduced to repel that presumption. But,

[\*] Lord Commissioner *Eyre* (2) said, that he thought the analogy to the statute of limitations ought to prevail in these cases, and that after so great a length of time, no legatee ought to recover; and by way of example to others, he thought the bill ought to be dismissed with costs against all the defendants. But,

Lord Commissioner *Ashurst* (3), thinking it would be hard on the plaintiff,

(2) and (3) The following report of the judgment is from the MS. notes of Lord *Culchester*.

" *Eyre*, Lord Commissioner. — This cause depends upon a presumption of fact; viz. whether the legacy has been already paid, and as at law such a claimant would be clearly bound, it would be highly inconvenient if a different rule prevailed here, and infinite mischief would ensue.

" There cannot be now any effectual account of the primary fund; viz. the original testator's personal estate, and a load of interest will have accrued, which ought not to be put upon the land without ascertaining that the personal estate was deficient.

" If I was obliged to conjecture, I think it very likely this was only a dormant demand, and it is very likely some few part payments of principal and interest may have been made; but none such are proved, and therefore general justice requires that such demand should not be established.

" The particular evidence to repel the presumption for length of time is here not sufficient.

" Application though to a wrong person may be good evidence to shew that the claim is kept alive, but the declarations of a person not the debtor cannot be received; and therefore as to what *Catherine Williams* here said, her words cannot bind the defendants, " who

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plaintiff, who had probably lost his legacy, and had been perhaps ill advised, to charge him with costs:

The bill was dismissed, as against the defendant *Catharine*, with, and against the other defendants, without costs.

" who would be liable. And I think there is no evidence of any specific demand of the legacy upon any person.

" We rejected a creditor's evidence of his not being yet paid, because he has an interest to obtain this decree; and we very much think that if received it would not rebut the presumption.

" Upon the whole the Court is glad to be at liberty to discourage this suit.

" Let the bill be dismissed; and to discourage such a suit, after such a length of time, let it be with costs as to *Catherine Williams*; and though I also incline to dismiss it with costs as against the other plaintiffs, yet, if Lord Commissioner *Ashhurst* thinks otherwise, I shall not persist in this point.

" *Ashhurst* Commissioner. — I think the length of time is such as that the Court should not entertain the suit. It is now forty-four years since the legacy was due. The analogies to the statute of limitations are highly useful to peace and quiet right of every man.

" Should we decree for the plaintiffs, the interest would be a charge upon these defendants after their living upon the estate as their own, and without preparing for such demand.

" I agree also that here is no evidence to rebut the presumption.

" The inferences here have been all on the part of the defendant, and not on that of the plaintiff or those who preceded him.

" I entirely concur that this bill must be dismissed; and, as against *Catherine Williams* with costs; but I think not against the rest, because this was clearly a good original demand, and a good foundation for the bill, though the presumption must be against the demand, it being unencountered by opposite evidence."

[S. C. 2 Ves.  
Jun. 23.]

24th November.

Lords Commissioners  
*Eyre, Ashhurst,*  
and *Wilson*.

Exceptions will lie to an award, but they must be to matters on the face of it, and not to matters of fact, of which the arbitrators are the proper judges. (1)

### DICK against MILLIGAN (1) [*et e contra*].

(Reg. Lib. 1791. A. fol. 32. b.)

THERE being complicated mercantile accounts between the parties, they had, by consent, been referred to arbitrators, who were to take them in the same manner as before the Master, but there was a provision that the award should be final between the parties. An award was made.

Exceptions were afterwards taken (1), because the arbitrators had not stated

(1) This order affirmed on a rehearing, by Lord Loughborough C., *postea*, 536. Upon the subject see *Woodbridge v. Hiltien*, *antea*, 1 vol. 398.; with the Editor's note as to S. C. in 2 Dick. 640.; from whence it appears that the opinion of Lord Thurlow was upon ancient authority, that exceptions would lie to an award, where the reference was merely ad computandum; but not if it embraced all matters in difference. Agreeably to this doctrine, the Editor has found the following note of the principal case amongst Lord Colchester's MSS., by which it appears, that Lord Thurlow himself had in the same year actually directed the exceptions to be filed. The note is as follows:—

" *Dick v. Milligan*, in Chancery, March 16, 1792. The Lord Chancellor ruled, that an award may be excepted to, by leave of the Court, though in *Price v. Williams*, and *Knox v. Simmonds*, it was refused last year as against the course of the Court. "Order that exceptions be filed." Lord C. B. Eyre, speaking afterwards of his own decision in the principal case, as above, in *Ford v. Gartside*, 2 Cox, 368., says "the case of *Dick v. Milligan*, did not warrant such a general proposition, as that exceptions may be taken to an award made in pursuance of an order of the Court. The Court had decided in that case, that where the original reference had been to a Master, with the usual reservation of further directions, and then by a subsequent order arbitrators were

stated the balances of the particular accounts, from which they had drawn the general balance.

And the first question agitated was, whether exceptions would lie to an award.

This question was argued much at large, but was reduceable to this, That the exceptants relied on the cases of *Cressley v. Carrington*, 1 Vern. 469., and *Hide v. Cooth*, 2 Vern. 109., that exceptions will lie to an award.

In support of the award it was argued, that the award was final, being by judges appointed by the parties.

[\*] Lord Commissioner *Eyre* (a few days after the argument) pronounced the opinion of himself and the other Lords Commissioners, to be, that exceptions would lie to an award, but that this was open to objections to the nature of the exceptions.

And, on this day, the exceptions were opened, when it appearing that they were to the facts of the case, and particularly to the arbitrators having drawn a general balance, and not having stated the particular balances, or how that general balance arose,

Lord Commissioner *Eyre* gave his opinion to the following effect:

When we made up our minds, that exceptions may be taken to an award, we only meant that *some* exceptions might be taken, but we agree that nothing that goes to the *facts* in the award, can come on by exceptions.

It was argued, that this was a reference to arbitrators, to be conducted in the same manner, as it would be before the Master; and there are words in the reference that seem to point at this; but we are of opinion that it was not a reference of this kind, and that it is impossible that it should be the same as a reference to the Master, because there is a radical difference between such a reference and an award; the Master, in a reference to him, being only the minister, and the Court the judge; but arbitrators are clearly the judges of matters of fact. There is a clause too in the reference, that the award shall be final; whereas nothing done before a Master is final.

The only question that remains is, whether it was necessary that the arbitrators should set forth in schedules the balances of the particular accounts, which make the general balance; and this we think unnecessary. If all the allowances and disallowances were set forth, nothing would result from it; the Court could make no order. The arbitrators say they have considered the accounts, and find that such a balance is due. Why require them to make a more particular award than is common in these cases?

[\*] There is a distinction between an award that is to be final, and one that is only to find a particular fact; when the reference is to be final, and all the accounts are before the arbitrators, the Court can only dispose of the costs. It would be of mischievous consequence, if wherever the Court sends complicated accounts to arbitrators, they

"were substituted in the room of the Master, to take the account in *like manner*, as they had been referred to the Master, the Court thought that under *such a reference* exceptions would lie; but by no means meant to say, that exceptions would lie where the reference was of all matters in difference, and the Court had reserved nothing to itself."

It should be observed, that the opinion of Lord Eldon C. seems averse to the Court suffering exceptions to be taken to an award in any case: for in *Crawshay v. Collins*, 1 Wils. Ch. 33. His Lordship is reported to express himself thus:—

"There have been many cases and much discussion in this Court on the question, whether arbitrators did not stand in the place of Masters, but we have long ago got rid of that doctrine. It was once argued that exceptions might be taken to an award, but it was never contended that the Court could order arbitrators to proceed if they did not choose."

should

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DICK  
against  
MILLIGAN.

[ \*118 ]

[ \*119 ]

1790

Dec  
against  
MILGAM.

should set out all the particulars, it is much better that the award should be made in the short way it is.

Lord Commissioner *Ashhurst*.

In mercantile transactions, the reference to merchants is more competent than to the Master of the Court. It would be nugatory to consider the arbitrators, as only being in the situation of the Master. This is a common reference, except the words, that the accounts ~~are to~~ be taken in like manner as before a Master. At the same time, it is provided that the award shall be final, and both parties were, to be bound by it. This could never mean to put the award of the arbitrators on the same footing as a Master's report.

Then the question is, whether the parties have a right to take exceptions to the award. The arbitrators are certainly judges, of matters of fact; and here it being matter of account, it certainly, was fit for the judgment of the arbitrators; and, by their judgment, the parties meant to be bound. The arbitrators here took the necessary steps to strike the balance. I think that matters of fact are not to be questioned on an award; therefore such exceptions cannot be gone into.

Lord Commissioner *Wilson*.

The exceptions are not that the arbitrators have done wrong, but that they have not set forth enough to show whether they have done right or wrong; they have not set forth the particular balances: if it had been before the Master, he must have done so.

Then the question is, whether the arbitrators are only substituted, by the reference, for the Master.

[ \*120 ]

[\*] That the reference should be in the same manner as before a Master, only meant that the same accounts should go before them, as would go before the Master, not that they should state the particular accounts.

The parties having agreed that the award should be final, it is not necessary, that the arbitrators should state the particulars, that we may judge of them over again.

There is a difference between a reference to arbitrators and to the Master. What is done by arbitrators, is conclusive; if not, it would go for nothing, because the time for making the award being elapsed, they can do nothing; whereas if the Master is wrong, it can be referred back to be re-considered.

But, here, the parties meant the decision to be final. If parties mean the reference to arbitrators to be only the same as it would be to a Master, they must provide for it.

If it had not been for the cases cited, I should have thought it better to have decided, that exceptions would not lie to an award.

Lord Commissioner *Eyre* added to what he had said, that if it was necessary to read affidavits, that must be on a motion to set aside the award: that if there is any thing in the award, that should not be in it, or any thing omitted that ought to be there, that being on the face of the award, is matter of exception; but where the objection arises from matter *dehors*, the award, it must be made on motion and affidavit.

Exceptions over-ruled. (2)

(2) This order was affirmed by Lord Loughborough C., *postea*, 536,

[\*] Hood and others against BURLTON and Others.

(Reg. Lib. 1792. A. fol. 8.)

THE bill stated a settlement previous to the marriage of the defendants *Burlton* and his wife, whereby certain sums in the funds, the property of the wife, were conveyed to trustees, to the use of herself till the marriage; remainder as to the dividends, &c. of certain parts, to the separate use of herself during the coverture, free from the debts or controul of the husband; remainder, after the death of the wife, to the use of the children of the marriage; and, in case of failure of issue, to the appointment of the wife by her will; or, in default thereof, to her personal representatives. It further stated that the marriage took place, and that the defendants had issue the other defendant, *George Burlton*; and that, after the marriage had, the defendant, *Diana Burlton*, proposed to grant the annuities therein after stated; and that, by indenture dated the 5th of April, 1786, and which had been duly registered and enrolled, made between the defendant *Diana* of the first part, the defendant *Ferdinand Burlton* of the second part, the plaintiff *John Hood* of the third part, the plaintiffs *Richard Gildart* and *Lucy* his wife of the fourth part, and the plaintiff *Edmund Hood* of the fifth part, reciting the settlement, and the trusts declared thereby, concerning two sums of 2650*l.* three *per cent.* consol. annuities, 1387*l.* 5*s.* 5*d.* Old South-Sea annuities, and 750*l.* three *per cent.* consol. Bank annuities, and the interest and dividends thereof; and reciting that the defendant *Diana*, having occasion for the sum of 800*l.*, had, in consideration of 400*l.* agreed to be advanced to her by the plaintiff *Gildart*, agreed to sell to him the annual sum of 50*l.*, part of the said dividends; and, in consideration of the like sum of 400*l.* agreed to be advanced to her by the plaintiff *Edmund Hood*, had agreed to sell to him the like annual sum of 50*l.*, part of the said dividends, for the term of her natural life; and that, for securing the said annuities, it had been agreed that the defendant *Diana* should assign the yearly interest of the said sums, then standing in the name of a trustee for her, unto the plaintiff *John Hood*, upon the trusts therein declared; and also reciting that the defendant *Ferdinand* had entered into a bond to the said plaintiff *John* [\*] *Hood*, in the penalty of 1600*l.*, to secure the annuities in case the dividends assigned should prove insufficient, it witnessed that, for the above considerations, defendant *Diana Burlton* assigned, and defendant *Ferdinand Burlton* confirmed, to the plaintiff *John Hood*, the dividends to accrue during the life of the defendant *Diana*, upon the sums therein mentioned, subject to the trusts therein mentioned, which were to pay the deficiencies (if any) of a former granted annuity of 30*l.* to *Jane Clerk* therein named, and, subject thereto, to retain the annual sums of 50*l.*, and 50*l.* so sold to the plaintiffs *Gildart* and *Hood* respectively; and the defendant, *Ferdinand Burlton*, covenanted to pay to the said plaintiff such deficiencies as were secured by his

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[\*121]

[Vide S. C.  
2 Ves. jun. 29.]  
27th November.

Lords Commissioners  
*Eyre, Ashurst,*  
and *Wilson*.

A grant of a certain sum out of dividends, to which a *feme covert* is entitled to her separate use, is a grant of an annuity.

The memorial of an annuity must set out all the interests of the parties, and all the instruments by which it is secured, or the defect will be fatal. (1)

[\*122]

(1) The report of this case, 1 Ves. jun. 29., is much preferable. Upon the subject of the memorial under the statute 17 Geo. 3. c. 26. setting out all the particulars, see the *D. Bolton v. Williams*, postea, 297. et seq., *Davidson v. Foley*, and *Jackson v. Lever*, antea, 3 vol. 598. 605. &c.

It is to be observed that the above and all other cases in these reports under the Annuity Act, must be considered as referable to the act of 17 Geo. 3. c. 26. only. By the late act, 53 Geo. 3. c. 141., the provisions made by the former have been repealed, and other provisions substituted in lieu thereof. In all cases, therefore, subsequent to the above act of the 53 Geo. 3. reference must be to that act alone.

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HOOD  
against  
BURLTON.

bond; and by the said indenture it was declared, by all parties, that the plaintiff *John Hood* stood possessed of the annual sum of 100*l.* in trust, as to the sum of 50*l.* to pay the same to the plaintiff *Edmund Hood*, and as to 50*l.* in trust, during the joint lives of said defendant *Diana Burlton*, and plaintiffs *Richard Gildart* and *Lucy* his wife, to and for the use of plaintiff *Lucy Gildart*, for her own sole and separate use, or to such person as she should appoint; and in case of the death of either of them, in the life-time of the defendant *Diana Burlton*, in trust for the survivor; and the defendant *Ferdinand Burlton* did, in the said indenture, covenant with the plaintiff *John Hood*, that he and the defendant *Diana* should apply to this court for an order to the *Accountant General* to pay to, or authorise the plaintiff *John Hood* to receive the interest and dividends of the funds upon which the annuities were secured.

The bill further stated, that, some time before the purchase of the annuities, a bill was filed by the defendants *Burlton* and his wife, and their infant son, against the trustees in their marriage settlement, in consequence of which there had been the usual decree, whereby the trustees were ordered to transfer the funds into the name of the *Accountant General*, and that the interest of the funds should be paid to the defendant *Diana* for her life, or until further order; and that the stocks had been transferred to the *Accountant General* accordingly.

[\*123]

The bill further stated; that the annuities were in arrear, and prayed that the trusts of the deed of the 5th of *April*, [\*] 1786, might be established, and that the principal sum of money in the funds, and the interest and dividends thereof, might be transferred to and applied according to the said deed and the trusts thereof.

The defendants, by their answers, admitted the facts as stated in the bill, and submitted, whether the trusts of the deed of the 5th of *April*, 1786, ought to be carried into execution, and the stocks or dividends thereof applied according to the said deed.

The memorial registered of the transaction was a memorial of *one annuity* of 100*l.* granted by *Diana Burlton* to *John Hood*, in trust to pay 50*l.*, part thereof to *Lucy Gildart*, and in trust to pay 50*l.*, other part thereof to *Edmund Hood*, at and for the price of 800*l.* It recited the deed of the 5th of *April*, 1786, and defendant *Ferdinand's* bond and warrant of attorney, but stated nothing of the interest of the survivor of Mr. and Mrs. *Gildart* in that annuity.

The question turned simply upon the validity of this memorial, it not, *correctly*, reciting the trusts of the deed of the 5th of *April*, 1786.

Mr. *Mansfield* and Mr. *Richards*, for the plaintiffs, contended, that this was not a grant of an annuity within the meaning of the act of parliament; that the real transaction was, that Mrs. *Burlton* being intitled, under her marriage settlement, to the interest of certain funds for her separate use, in consideration of the payment of certain sums, assigned a *part of the interest*, in trust to pay two annuities of 50*l.* each. It is, therefore, no more than an assignment of part of her interest. If she had assigned the whole of her interest in the funds, there could be no necessity to register the assignment. An assignment of an existing annuity need not be enrolled, nor an annuity charged upon an estate of which the grantor is tenant for life. The memorial satisfies the intent of the acts; although, in form, it is irregular, all the instruments by which the annuity is secured are mentioned in the memorial. They cited *Cresigny v. Wittenoon*, K. B. 4 Term Rep. 790.

[\*124]

[\*] Mr. *Mitford* and Mr. *Stanley* for the defendants *Burlton* and wife.

The first objection is, that this is not the grant of an annuity; but the answer to this objection is, that it is enrolled by the plaintiffs as a memorial

memorial of the grant of an annuity. *Crespigny's* case was not within the act, not being granted for any particular pecuniary consideration. Here the memorial is clearly defective, the particulars of the annuity deed are not specified, nor does it state the parties, or the consideration; the bond is not sufficiently stated, nor the warrant of attorney.

Lord Commissioner *Eyre*. If the contract cannot be supported, it will be a hard case: but considerations of public policy often outweigh the hardship of particular cases. At first I was inclined to think it was a purchase of a portion of the dividends, not of an annuity; but, upon further consideration, I am clearly of opinion, that it is the purchase of an annuity. It is objected, that here is no grant of an annuity: but that objection will not avail the party. The intent of the act was, that all the instruments should be registered by which an annuity is secured, — not merely the instrument by which it is granted. I am of opinion, that the memorial here is not a memorial of the annuity really secured, being of *one annuity* instead of *two*; there is no memorial of the actual annuities registered.

The memorial does not specify particularly for whose use the annuities are granted, at least as to one of them.

Lord Commissioner *Ashurst*. I am sorry to be of the same opinion; but it is clear the parties considered the transaction as the sale and purchase of an annuity: there is no objection to the fairness of the transaction.

Bill dismissed without costs. (2)

(2) As to all the defendants but *James Berry* and *James Clarke* and *Jane* his wife: and as to them with costs.

1792.

Hood  
against  
Boatman.

[\*] ANDREW *against* WRIGLEY.

[\*125]

(No Entry.)

**GEORGE BROADBENT**, being possessed of a term of years in the premises for 199 years, commencing the 19th of *November*, 1746, at the rent of 13*l.* 13*s.* *per annum*; and having sold a part of the leasehold premises to *Eneas Broadbent*, subject to the payment of 5*l.* *per annum*, payable to the original lessor, by which the rent of the premises remaining unsold, was reduced to 8*l.* 13*s.* made his will bearing date the 6th of *May*, 1753, and thereby, after directing the payment of his debts and funeral expences, gave to his wife some small specific legacies, and all the clear profits that did and might arise, of and from the messuage or tenement, which he held under *James Farrer Esq.* (being the premises in question) lying and being in *Harrop*, in the parish of *Saddlesworth* aforesaid, and to receive it as followeth during the term of her natural life; and first, said testator willed that she should receive 40*s.* a-year, yearly and every year, until all his just debts were paid and discharged; and what was over and above 40*s.* to pay his debts, until all were discharged, and after all his debts were paid, he gave to

*Rolls*, 1st Dec.

Executor or administrator where there are debts may sell the testator's term specifically devised (1); and, even in suspicious circumstances of fraud, after long possession by the purchaser, or the person under whom he takes, the Court will not relieve. (2)

(1) For the general doctrine on this subject see *Scott v. Tyler*, *antea*, 2 vol. 431. and the Editor's notes. *Hill v. Simpson*, 7 Ves. 152. *Taylor v. Hawkins*, 8 Ves. 209., and *McLeod v. Drummond*, 14 Ves. 353. affirmed on appeal *per Lord Eldon C.* 17 Ves. 152. *et seq.* in which his lordship comments upon most of the preceding cases.

(2) Upon the subject of length of time, *vide E. Deloraine v. Browne*, *antea*, 3 vol. 633. &c. with the Editor's notes, and 1 Jacob & Walk. 51. 59. 63. &c.



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ANDREW  
GREGG  
WRIGLEY.

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his beloved wife, all the profits and benefits that did or might arise from the aforesaid messuage or tenement, during the whole time of her natural life, and declared his will to be, that, at the decease of his wife, his niece *Sarah*, the wife of *John Andrew* (meaning the plaintiff *Sarah Andrew*, widow,) should have and enjoy the aforesaid messuage and tenement, during all the time of her natural life, if she should then be living; and that if (plaintiff) *Sarah* the wife of *John Andrew*, should have a child or children, at the entrance hereof, that she should pay or cause to be paid the sum of 40*l.* which he charged upon the aforesaid tenement, unto his the said testator's sister *Sarah's* children (the plaintiffs) to be equally divided among them; and (plaintiff) *Sarah Andrew* should have the aforesaid messuage or tenement, and her heirs, during the whole term; but if (plaintiff) *Sarah* should have no children at her decease, then he gave the aforesaid messuage or tenement to *John Greaves* and *George Broadbent* to be divided between them, in such shares and proportions as by the will expressed, and appointed *John [\*] Whitehead jun.* and *James Broadbent* executors of the said will.

The testator died the 9th of *May*, 1753, leaving *Mary Broadbent* his widow, and the executors never proved the will, and *Mary Broadbent* the widow procured letters of administration with the will annexed, from the proper Ecclesiastical Court, and about the 2d of *June*, 1758, she intermarried with *Philip Bradbury*; and afterwards in *August*, 1768, *Philip Bradbury* being indebted to *Benjamin North*, an attorney of *Almonbury*, *Yorkshire*, by indenture of mortgage dated the 11th of *August*, 1755, *Bradbury* and his wife, described to be administratrix with the will annexed, of the said *George Broadbent*, in consideration of 32*l.* conveyed the said premises to *Benjamin North*, for the residue of the term, with a proviso for redemption on payment of the 32*l.* with interest. By indenture dated the 9th of *May*, 1757, said *North* and *Bradbury* and his wife, described as administratrix, in consideration of 80*l.* (out of which the said debt to *North* of 32*l.* was discharged) assigned the mortgage to *Catherine Whitehead*; and *Philip Bradbury*, afterwards, without the concurrence of his wife, being indebted in 20*l.* to the said *Catherine Whitehead*, by memorandum under his hand dated the 11th of *May*, 1758, indorsed on the said indenture of mortgage, charged the premises with the said further sum of 20*l.* and interest.

In *May*, 1758, *Philip Bradbury* contracted with said *Catherine Whitehead* and *John Antill* her partner, for the sale of the premises for 150*l.* over and above the mortgage-money due thereon; and by indenture of the 11th of that month, *Bradbury* and *Mary* his wife assigned to *John Antill* and *Catherine Whitehead* all the said leasehold premises, and the right and title of *Bradbury* and his wife, to *Antill* and *Whitehead* for the residue of the term; and *Antill* and *Catherine Whitehead* entered into possession of the leasehold premises.

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*John Antill* afterwards died, having made his will, and appointed *William Antill* his executor, and *Catherine Whitehead* about *August*, 1779, contracted with the defendant *Wrigley* for the sale of the premises, for 231*l.* The purchase was not completed, or the purchase-money paid for two years; but by [\*] indenture dated 22d of *October*, 1781, *William Antill* and *Catherine Whitehead* assigned the leasehold premises to defendant *Wrigley* for the residue of the said term, and the defendant *Wrigley* entered into, and has since continued in possession thereof.

*John Andrew* (the husband of the plaintiff) died in 1769, leaving the plaintiff his widow, and nine children, who are all now living.

*Mary* the widow of the testator, survived *Philip Bradbury*, and afterwards married *John Broadbent*, and died about *March*, 1788, when the plaintiff

IN THE COURT OF CHANCERY.

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ANDREW  
against  
WRIGLEY.

*Sarah Andrew* claimed to have become entitled, under the testator's will, to the possession of the premises, with such contingent interest to others of the plaintiffs as are provided in the will.

plaintiff *Sarah Andrew* filed the present bill against *Wrigley* the defendant, praying a discovery, and that he may be decreed to deliver possession of the premises, and to pay intermediate rents and

the bill charged that the testator was not indebted at the time of his death or but to a very small amount, and that the same were discharged by the sale of his goods, or out of the rents and profits of the premises before the mortgage to *North*, and that this was known by the defendant, or might have been so, that the defendant bought the premises at a very great undervalue, and with full notice of the testator, and the bequest therein to the plaintiff, and that he knew that the assignments were to secure the debts of *Bradbury* on account, and that it was on account of his knowledge that a title could not be made, that the defendant declined completing the purchase for two years, and that he then took a bond of indemnity, and other collateral security.

The defendant, by his answer, swore to his belief, that the real estate of the testator was insufficient for payment of his debts, and that, in the recitals of the indenture of the 11th of August, 1755, and of May, 1777, it is mentioned that the testator's widow and *Bradbury* (her second [\*] husband) had occasion for the sums mentioned in such indentures mentioned to have been paid to them, for the purpose of paying or re-imbursing themselves what they had paid in payment of the testator's debts, and which recitals the defendant admitted to be true, and from such recitals he believed the personal estate of the testator (exclusive of the leasehold estate) was insufficient to pay the testator's debts; that he believed the mortgage to *North* was made to secure any debt previously owing from *Bradbury*. He admitted the purchase by *Catherine Whitehead*, and that she caused the premises to be put up for sale by auction, and that he the defendant became the purchaser thereof, as the best bidder for the same at 231*l.* which was the value thereof, considering the title of *Catherine Whitehead* and *Antill* to be a good title; and that he did not delay the completion of the purchase on any suspicion of the title; that at the time of the execution of the indenture of the 22d of October, 1781, a deed was executed by *Catherine Whitehead*, for performance of the covenants therein contained, and that those covenants were only the covenants; but that he had no bond of indemnity; and that he was in possession of the premises ever since the conveyance; and that he paid out considerable sums in the improvement thereof.

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The plaintiffs, at the hearing, read evidence to prove that *Broadbent* the testator was a poor man, and a working clothier, but never made a profit of cloth on his own account: that he had been a soldier, but disabled, and had kept a public-house, and owed some debts; and that the marriage of the widow with *Philip Bradbury*, who was considered as an in bad circumstances; that *Mary* the widow had, at the time of her marriage, no property but what she had as widow of the testator; that the tenement about the year 1779, was worth about 201*l.* to be let; and that it was publicly known, at the time of the sale, that the defendant had a claim on the premises, under the will of the testator; and the witness swore that, on the day of the sale, the defendant said to the plaintiff that *Edward Greaves* seemed to dispute the title, to which the plaintiff answered, never mind Mr. *Greaves*, James *Wrigley*, I'll give you a bond to indemnify you.

The defendant read evidence to improvements during the time the premises were in leasehold

[ \*129 ]

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WRIGLEY.

leasehold estate was possessed by *Catherine Whitehead*, and of the defendant.

The cause was heard in *Michaelmas* term.

Mr. *Mitford* and Mr. *Richards* for the plaintiffs. The question is as to the power of the administratrix of the testator, to sell the estate of a specific devisee under the will. In cases of this sort, where the party had no right to sell, the Court has interfered, especially where enough has been known of the state of the testator's effects by the purchaser, to induce him to make enquiries as to the necessity of selling the estate. Here, the testator having pointed out a specific fund for the payment of his debts, the administratrix, before she could sell the estate specifically given, was bound to enquire whether there were debts that could not be paid by the method pointed out. He had pointed out rents and profits beyond 40s., and as the debts were trifling, if any, those rents and profits would have paid them if duly applied. The estate was not sold till two years after the death of the testator, by which time it must be known what the debts of the testator were, and whether the rents and profits would pay them. Then if the purchaser knew there were no debts, and that the estate was specifically devised, that is sufficient, and he cannot hold the estate against the specific devisee; and it is in evidence here, that *Wrigley* had such notice, that it was generally known in the auction room, and particularly declared to *Wrigley* by *Greaves*, the plaintiff's father, that the estate was specifically devised to her. There are several cases on this subject which are collected together in that of *Scott v. Tyler*, (*ante*, vol. ii. p. 431.) and although there was no decree upon the second point in that case, it is certain the inclination of Lord *Thurlow*'s opinion was against persons who bought estates under circumstances like those of this case, without enquiring how far it was necessary to sell them. There certainly are cases where it has been determined. In *Humble v. Bill*, (3) 2 Vern. 444, *Bill* having a term in a printing-office, devised it, that 2000*l.* should be raised out of the profits for his daughter *Savage*, and made *Garret* executor, who mortgaged the term to Dr. *Brown*, who assigned to Sir *William Humble*; the Court was of opinion that the executor had power to sell [\*] or aliene, and that if he sold in prejudice of a residuary or specific legatee, he might have his remedy against the executor, but could not follow the estate into the hands of the purchaser. But on an appeal to the House of Lords, that decree was reversed, 1 *Brown* Parl. Cases, 71. Where the purchaser has notice that another way is pointed out for payment of debts, as in this case, it is sufficient to make the purchase bad. In *Opie v. Godolphin*, Prec. Chan. 548., the mortgagee had only notice of the will, yet that was held sufficient. In *Ewer v. Corbett*, 2 Wms. 148, it is said, that "the executor, where there are debts, may sell a term;" but the Master of the Rolls says, "I admit if an executor should sell a term for an undervalue, or to one who has notice that there are no debts, or that all the debts are paid, this might be another consideration." And by *Elliot v. Merriman*, Barnadiston. Ch. Rep. 78. (4) personal estate may be clothed with such a trust, that the Court might require the purchaser to see that the money is properly applied. In *Bonny v. Ridgard*, (5) Lord *Kenyon* said, that *Elliot v. Merriman* contained his opinion. In *Bonny v. Ridgard*, *Watts* the testator having a leasehold estate, directed it to be sold and divided among *Martha Watts* and all her children equally; the testator died in 1747, *Martha* alone proved the will, and in 1748 *Martha* married *Ridgard*, who became a bankrupt. His assignees assigned to *Barnard* in

[ \*130 ]

(3) See upon this also *per* Lord *Eldon* C. 17 Ves. 160. 161.

(4) S. C. 2 Atk. 41. Upon which see *per* Lord *Eldon* C. 17 Ves. 162.

(5) Lately reported, 1 Cox, 145., and stated and approved 7 Ves. 159. 167., 17 Ves. 97. 98., *et vide per* Lord *Eldon* C. 17 Ves. 165. See also 1 Ball & Beatt. 167.

It was assigned 1st June, 1763, by *Barnard to Mason*; and on 4th of June, 1765, by *Mason's administratrix to Anderson*, who on 10th of November, 1773, conveyed to *Van Mildert*: the bill was filed 179, and Sir *Thomas Sewel* made his decree 10th of March, 1783. He divided the matter into two parts, and said, in the first place, that an executor may dispose of his testator's personal estate, where the action is fair; and for this he cited *Crane v. Drake*, (6) 2 Vern. 616., *Ewer v. Corbet*: he also thought, that though *Van Mildert* had no objection, except that it was a specific bequest, that it was his duty to see to the purpose for which it was given. After this decree *Van Mildert* presented a petition of rehearing to Lord *Kenyon*, who, at the hearing, said nothing was more clear, than that, in general, an executor may dispose of the real estate, and that the purchaser is not bound to see to the application of the money; but if there is any fraud, then the purchaser is bound. He said he would not accede to the case of *Mead v. Lord Orrery*, (8) 3 Atk. 179, but he decided the case upon [\*] the length of time that had elapsed. In the present case, that objection does not apply; the present plaintiffs could not assert their right till 1788, and they filed their bill in

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against  
WRIGHTLEY:

[ \*131 ]

*r. Lloyd* and Mr. *Johnson*, for the defendant. Under the circumstances of this case, and especially from the length of time before the action, this bill ought to be dismissed with costs.

The parties have not brought the real question before the Court; the question as it is made, does not raise the question. It will be proper to go through the cases, and to state the law upon them.

There is no difference, either at law or in equity, between the assignment of an executor or administrator. In either case, there can be no objection to a Court of Equity, for a discovery whether there has been any assignment between the purchaser, and the executor, or administrator. Now, the executor has a right to alienate all the personal estate of his testator, and it makes no difference whether it is given generally or specially by the will. The more complicated the affairs of the testator, the better right has the executor to sell the property. Mr. *Mitford*, cited on the case of *Humble v. Bill*. It is an old case, and there was no fault from the directions in the will. It was determined against the executor, because the testator had pointed out the profits of the printing-office, as the fund out of which the 2000*l.* was to be raised. That is not to be supported, but by supposing the transaction was a loan. There is something said in *Elliot v. Merriman* to show that a trust may be so formed, that a purchaser must see to the will. *Ewer v. Corbet* recognises the power of the executor. So also is *Burting v. Ward*, 2 Wms. 150., the next case to *Ewer v. Corbet*. The power of an executor or administrator is the same with that of trustees to sell the property, or charged with debts. And there is not a doubt, from the case of *Elliot v. Merriman*, that they may sell or mortgage the property. In fact, mortgaging the property, is the most advantageous to the family, because they may redeem. And in either case, the purchaser or mortgagee is not obliged to see to the application of the money, as the debts are specified or scheduled. It is of no significance how complicated the trust may be, the conveyance to the purchaser is good.

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To impeach the sale, a very strong case must be made, there must be evidence of fraud or imposition: it may certainly be done where evidence is given of a contrivance, as selling for a great undervalue, or where

(6) See upon this also per Lord *Eldon* C. 17 Ves. 161, 162. &c.

(7) 3d December, 1784.

(8) *Vide per* Lord *Eldon* C. upon this, 17 Ves. 164.

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there were no debts, and therefore the estate not wanted. But the evidence, in the present case, was by no means sufficient for the purpose, and without very full evidence, determinations against a purchaser would render the proceeding of courts of justice so uncertain, that nobody would buy of an executor. The length of time too is in this case very material, for although the estate did not fall in till the death of the tenant for life, the present parties had certain interests, and might have filed their bill to have the sale set aside. In *Bonay v. Ridgord*, (9) Lord Kenyon dismissed the bill on that ground, there the executor had given away the estate, which was recited to be of no value, but appeared to be of considerable value. In that case Sir Thomas Sevel had given relief, and Lord Kenyon would have affirmed the decree, but for the length of time. Mrs. Whitehead's title in this case was good at law. The judges of the Court of King's Bench, have established the law of *Nagent and Giffard*, 1 Atk. 463. In a case of *Farr v. Newman*, (10) 4 Term. Rep. 621. Mr. Justice Buller, in a note, speaking of that case, held it to be good law, unless the purchaser knows that there are no debts: for the presumption is, that the executor has paid debts, and sells to reimburse himself. Where a man directs payment at a future time (as out of rents and profits, which must accumulate) the creditor is not bound to stay till his debt can be paid, and the executor may be obliged to sell. In the present case, the question is not whether Wrigley made a fair purchase; but the true question is, whether there was a fair sale to Mrs. Whitehead. If her purchase was fair, any notice to Wrigley, or his taking a bond of indemnity would be immaterial; for if a subsequent purchaser with notice, has purchased of one who had no notice, he has a right to stand in the place of the first purchaser. *Lowther v. Carleton*, For. 187., shows that his having taken a bond of indemnity, would not have made his case worse. There is no case made by the bill, to make the sale to [\*] Mrs. Whitehead bad; but it is brought before the Court, merely on the sale to defendant Wrigley. As to the 1st transaction being a mortgage, that is no objection; an executor may make a mortgage. In *Mead v. Lord Orrery*, it was a mortgage. In this case, the first transaction was the mortgage to North. It is said to be for the debt of Bradbury; but that is not made out in proof, or even that he owed North any thing. At this length of time, the Court will presume that it was necessary for the payment of the debts of the testator. Though a trustee to pay debts, cannot sell to pay his own debt, an executor, from his general power over the assets, may; and the vendee may retain, *Ithell v. Beane*, 1 Vesey, 215; but it cannot be presumed now, that either the transaction with North, or between him and Mrs. Whitehead, had any unfair motive. Nor is there any ground to suggest that Mrs. Whitehead did not pay the consideration. Then Wrigley has a right to stand in the place of Mrs. Whitehead. He did not take the estate from the administratrix; he bought it at a sale, where it was sold on the part of Mrs. Whitehead.

Unless absolute fraud or collusion is shown, the sale is good; to prove it otherwise, it must be shown that the purchaser knew the executor or administrator was not acting in his character as such. (11)

Wrigley has been ever since in possession, and has laid out a great deal of money on the premises, treating them as his own. *Bedford v. Woodham*, and *Wyatt, Exchequer*, 27 February, 1790. (12)

(9) 1 Cox, 145. See the references in note (5) *antea*.

(10) See upon this *per Lord Eldon C.*, 17 Ves. 168, 169.

(11) This will be found to be the result of the cases referred to by note (1) *antea*.

(12) It is reported in a note to *Dickenson v. Lockyer*, 4 Ves. jun. 40.

Mr.

*Misford* in reply. The case of *Savage (Bill) v. Humble*, is on a ground which applies to the present case.

In *Ony v. Ridgard*, the great objection was, that the will ordered a mortgage was not a compliance with the will.

But that where the trust is general, the purchaser is not bound to see the application of the money; but when the [\*] money is to be applied to the payment of debts, then the purchaser is obliged to see to the application.

The present case is to be judged of upon the same principles.

In *v. Lord Orrery* is a case that has been much relied upon; but considering that case, Lord *Hardwicke* rested much on the particular circumstances. He argues, on that case, that the executors had recited that it was the estate of *Mead* the younger.

There was a specific direction how the estate was to be disposed of; that will not supersede the general power of the executor. It is recited that *North* supplied the money, and that it was conveyed, by mortgage, to *North*. He recited in the mortgage deed, what he considered necessary to make his title a good one; he recites the will, and that the money was wanted for payment of debts. He was aware that such a recital was necessary, because it was a disposition in contradiction to the will.

It comes the second conveyance to Mrs. *Whitehead*. It must be recited at that time, what were the debts of the testator; the recital is, that the money raised was for the discharge of other outstanding debts, funeral expences; so that 80*l.* was all that was then wanted for the discharge of the debts, and funeral expences of the testator. The recital is, that the parties knew that it was necessary, to support the transaction, that the money should be wanted for the payment of debts; and they advance more money after such a recital, they pronounce themselves against themselves. The third instrument is equally objectionable; it takes notice of the same recital. It is not pretended that the money was cured by the indorsement was wanted for payment of debts. The third instrument recites, that it was in consideration of 130*l.* without anything further. It does not say over and above the other sums. These are very strong circumstances, to show that the parties knew it to be a fair transaction. This deed ought to have recited, that the 130*l.* was over and above the former sums. It condemns itself, for reciting the former deed, which [\*] shows they knew it was necessary that the money should be wanted for payment of debts. It is to be observed, therefore, that the reason of there being no such recital was, was not the fact.

This distinguishes the present case from that of *Mead v. Lord Orrery*; in that case, they could not presume the recital, that it was the money of *Mead*, false. Here if the sum was not additional to those before, the conveyance was for a very inadequate price; if it was additional, it should have been recited that it was so. This brings it very near the case put in *Ewer v. Corbet*, there is the fraud that will vitiate the transaction. Then only the two first instruments being fair, Mrs. *Whitehead's* interest was redeemable on payment of 80*l.*, and *Wrigley* purchased with full notice that only 80*l.* was necessary for the purposes of the mortgage. If a mortgagee sell to a third person, that third person will be bound. *Wrigley* was bound, because he must see by the deeds that only 80*l.* was necessary. Where a person takes an assignment of a mortgage, he is bound to see what is due at the time he takes it. On this day gave judgment. After stating the case at large, he pronounced the following effect.

It had been a recent application, and the matter quarrelled with immediately,

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immediately, the circumstances are so suspicious, that it might have been set aside. The testator here wished what no testator has a right to do, that the debts should be paid in the way charged by the will (out of rents and profits), but an executor is not bound to comply with such a desire in a will, as he may be compelled to pay the debts sooner than they can be paid according to the charge.

But would a *bond fide* purchaser be bound to enquire as to the necessity of raising the money? I think he ought, and that it was suspicious that the estate was given away without cause. I think, therefore, that if this had been quarrelled with during the life of *Bradbury* and his wife, there might have been relief. But from 1758 to 1779, *Whitehead* and *Antill* have been in possession contrary to the intention of the will. What, were the persons interested to lie by all this while? Though [\*] their legacies were contingent, they had such an interest as entitled them to know what debts the testator owed, and what part of his estate had been applied to the payment of them. Then, what is the case in 1779? The defendant purchased the estate at a public auction, and then the parties interested give notice of their claims. Then, it is truly said that notice could only affect *Whitehead* and *Antill*, for it has been repeatedly held, that where the vendor has no notice, notice to the vendee is immaterial, as otherwise the estate would be inalienable for ever. The purchaser stayed two years, and then completed the purchase.

I should do a very violent thing, if I was to relieve in such a case as this.

Then as to the cases on the subject. (13) It is said this is a sort of case where a court of equity will not give relief, and for this purpose *Mead v. Lord Orrery*, and *Nugent v. Gifford*, are cited: it is stated, that the power of the executor is such, that he can make a title to a purchaser, even though for his own debt.

*Nugent v. Gifford* (14) is very shortly stated in 1 Atkyns, 463., it appears from the Register's book, that it was not a specific devise of a term. It is no where decided, that the executor can sell a term specifically devised, for his own debt. In that case it was part of the general assets of the testator. It is in the Register's book, 1738, B. 117. (14) It was a term vested in trustees for Sir *Richard Billings* and his wife. Sir *Richard Billings* by his will, gave several specific legacies, and made Mr. *Arundell*, his natural son, executor and residuary legatee. In 1718, two years after Sir *Richard's* death, the son had become indebted to *Knight*, one of the trustees of the term. He assigned to *Knight* the term, inasmuch as he could as executor, and there was an account settled between them: there was no bill for an account against *Arundell*. It was not incumbent upon a purchaser from an executor and residuary legatee, to enquire whether the debts were paid. That case may be rightly determined. In *Mead v. Lord Orrery*, 3 Atk. 235. there were three executors, one of them had a share of the residue. He had occasion to give security in the Master's office, and for that [\*] purpose assigned to the Master a mortgage of his testator, reciting a sum due upon it, and that the same was his proper money; and the other executors joined in the conveyance. In both these cases, therefore, the vendees had reasonable ground to believe the vendors had good titles. If the case stood merely on the executor making the security, it would be very suspicious; but Lord *Hardwicke* relied on his being entitled as residuary legatee. In *Savage*

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(13) See them most ably commented upon with most of those subsequent to the principal case, per Lord *Eldon* C. in *M'Leod v. Drummond*, 17 Ves. 160. et seq.

(14) See also per Lord *Eldon* C. upon this case, 17 Ves. 163.

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[*Bill*] v. *Humble*, I should have hardly assented to the reversal. (15) *Ewer v. Corbet*: The Master of the Rolls seems to think that case has gone too far: it is not a very clear case, but it appears there had been bills filed in Chancery concerning it, and that there was a bill depending, when Sir *William Humble* advanced his money: *Garra* the executor had been decreed to transfer his trust, so that he was under a decree to transfer, when he mortgaged to *Brown*, and afterwards to *Humble*; *Mrs. Savage* afterwards got another decree. If these were the grounds on which the House of Lords proceeded, I must dissent from their judgment. This was not the common case of an executor mortgaging the property of the testator, which might or might not be for the purposes of the will. There was no lawyer, at that time in the House, (unless perhaps Lord *Somers*,) and the case was much embarrassed by circumstances. *Crane v. Drake*, 2 Vern. 616., was determined on the ground that the alienee was a party to the fraud, and was consenting to a *devastavit*. In *Ewer v. Corbet*, it was only held that the testator having given property specifically, could not prevent the remedy of the creditor. In *Crane v. Drake*, there was another circumstance, it was to pay his own debt. Can there be a stronger case of a *devastavit*, than an executor aliening the property of his testator to pay his own debts, and the alienee there knew that the plaintiff's debt was due. In *Paget v. Hoskins*, Pre. Ch. 431. Gilb. Eq. Rep. 111. it is said, Mr. *Vernon* was much dissatisfied with the decree. But in *Mead v. Lord Orrery*, Lord *Hardwicke* said, he saw no grounds for that dissatisfaction. (16) There is a note in *Gilbert*, that Mr. *Talbot* referred to a case (when Lord *Cowper* had the seal before) that where the party knew of other debts, he could not take the testator's property in satisfaction of his own debt. As to *Elliot v. Merriman*, it is not necessary to attend very particularly to the circumstances of that case; the dismissal was in favor of the alienation; the bill was dismissed with costs. With respect to [\*] a trust for payment of debts, there is no pretence that such a trustee could alien in payment of his own debt, *Ithel. v. Beane*, 1 Vesey, 215. (17)

Mortgaging is not the natural way of paying debts, though, in some cases, it may be the most proper way; but it would lead to an enquiry, as to the circumstance of the testator's estate.

Here, Mr. *Mitford* acknowledged he could not impeach the first or second transactions.

*Bonny v. Ridgard* (18) is very much like this case; there the executor sold the term which came by mesne assignments to *Van Mildert*. Enough was disclosed, in Sir *Thomas Sewel's* opinion, to obtain a decree. *Van Mildert*, in his petition for a rehearing, stated, that he was a purchaser from other purchasers, that he had no notice, and had been twenty years in possession. Lord *Kenyon* proceeded merely on length of time; he said, nothing was clearer than that an executor may sell the property of the testator, and that the purchaser need not see to the circumstances of the testator's estate; but if there is any fraud, then the purchaser must see to the circumstances: it is not necessary that a mortgage deed from the executor, should recite that the money is borrowed for the payment of debts: but it must appear that it was not for payment of debts to vitiate it: that *Barnard* had notice the term was specifically given: but that he should decide it, merely, on the

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(15) See also per Lord *Eldon* C. upon this, 17 Ves. 161.

(16) But see Lord *Eldon* C.'s observations upon this, 17 Ves. 161.

(17) Lord *Eldon*, also, was of the same opinion, contrary to that of Lord *Mansfield*, in *Whale v. Booth*, 4 T. R. 625. note. See in *McLeod v. Drummond*, 17 Ves. 165, 166.

(18) 1 Cox, 145. See upon this, also, the references in note (5) *antea*, p. 130.

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length of time; and then cited two cases as to the analogy to the statutes of limitation.

So I shall do in this case. If it had come recently before me, under so suspicious circumstances, there might have been a case for relief. As it is, I must dismiss the bill; but as the defendant had some notice, and, I dare say, had a beneficial bargain, I will give no costs.

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[\*] PRYOR against HILL.

(No Entry.)

Rolls, 1st Dec.

A *feme covert* being entitled to the interest of funds for life, her husband makes a general assignment of his estate for the benefit of creditors; the assignees shall not take the dividends, without making a provision for the wife. (1)

[The wife is equally entitled to a settlement although the children of the marriage may be provided for *aliunde*. (2)]

**WILLIAM BARBER** made his will, dated 17th of February, 1780, and thereby gave to his wife *Mary Barber*, her executors and administrators, 1750*l.*, in trust to place out the same at interest, and to pay the interest and produce thereof unto his niece *Sarah Taylor*, during her life, and, after her decease, he gave the principal sum to the child or children of *Sarah Taylor*, share and share alike; but if she should die without leaving any child or children, then it was the testator's will that his wife, &c. should pay the interest to the defendant *Catherine Mason* during her life; and, after her decease, he gave the principal to the child or children of *Catherine Mason*, share and share alike; and the testator gave to his wife, &c. another sum of 1750*l.* in trust, to lay the same out at interest, and to pay the interest to the defendant *Catherine Mason*, during her life; and, after her decease, he gave the principal to the child or children of the said *Catherine Mason*, share and share alike, and appointed his wife sole executrix.

The testator died in September 1783, without revoking his will, and his widow proved the same, and invested the said two sums of 1750*l.* each, in the purchase of 3 per cent. consol. Bank annuities.

*Sarah Taylor* died in the life-time of the testator without issue.

The widow, soon after, intermarried with the defendant *Hill*.

The defendant *Mason* (the husband of defendant *Catherine Mason*) being indebted to the plaintiffs and other persons, 15th of November, 1788, made a general assignment to the plaintiffs of his stock in trade, debts, and other effects whatsoever, in trust for themselves and the rest of his creditors.

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[\*] The plaintiffs filed this bill against *Hill* and his wife, as trustees, and against *William* and *Catherine Mason*, praying to be paid the interest and dividends on these two sums, until they should have received their full demands. (3)

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(1) See Mr. Roper's valuable Treatise on the Law of Husband and Wife, 1 vol. 266. &c., Mr. Coe's note on *Bosvil v. Brander*, 1 P. Williams, 459, and *Bereford v. Hobson*, 1 Madd. Rep. 362. &c., in which most of the authorities are collected.

(2) From Sir S. Romilly's MS. note of the principal case, in the collection of Lord Colchester. See it in note (3) *postea*.

(3) The following note of the remainder of the principal case was taken by Sir S. Romilly, and is from the MS. collection of Lord Colchester:—

"The defendants *William Mason* and *Katherine* his wife, by their answer stated, that *Katherine Mason* had at the time of her marriage brought her husband a portion of 1100*l.*, that no settlement had ever been made on her by her husband, that at the time when the assignment was executed *William Mason* was seized in fee of a real estate of the annual value of 40*l.*, that *Katherine* would have been entitled to dower of that estate if she had survived her husband, and that that estate had been conveyed for the benefit of the creditors, and she had levied a fine of it to bar her dower, which

The question was, whether the assignees were entitled to these dividends, without making a provision for *Catherine Mason* for life, she having children (by the co-defendant *William*) who, after her decease, would be entitled to the principal.

*Mr. Mitford* and *Mr. Richards* (for the plaintiffs) insisted, that the assignees of *Mason* had a right to the dividends for *Catherine Mason's* life, till they, and *Mason's* creditors entitled under the deed, should have received their full demands.

They insisted that a wife's equitable interest in personal property was, by the law of *England*, a right vested in the husband, and assignable by him to his creditors.

They admitted the general equity of the court, in requiring a settlement upon the wife, before the husband could obtain her property, either from the court, if it was there, or out of any other fund in trust for the wife.

They admitted this equity in the case of a bankrupt, as represented by assignees.

But they insisted that no case was to be found in which the court had extended this rule to a mere life estate of the wife; contending that,

she would not have done, if she had not understood that her interest in the 626*l.* 7*s.* 3*d.* bank annuities would not be affected by the assignment, and that the defendants had eight children, of whom only one was provided for, and the defendants insisted that *Katherine Mason* ought to be permitted to receive the whole dividends of the 626*l.* 7*s.* 3*d.* for her life for her separate use.

*Mitford* and *Richards* for the plaintiffs contended that they were entitled under the assignment to the dividends of the bank annuities during the life of the defendant *Katherine Mason* without making any settlement on her. — They admitted that a husband or the assignees of a husband who is become bankrupt and who sues in equity for a sum in gross, which they are entitled to in right of the wife, must make a provision for her; but they insisted that that rule of equity had never been extended to the case of a particular assignee for a valuable consideration, or the case of a mere life-interest or annuity payable to the wife: that this was to be considered as the case of a particular assignee, the assignment here not being by operation of law as is the case in bankruptcy but an assignment by deed; and they relied on the case of *Tudor v. Samyng*, 2 Vern. 270., and on the dictum of Lord *Thurlow*, in *Worral v. Maslar*, 1 Cox's P. W. 459 note. That in none of the cases in which a husband or his assignees had been compelled to make a settlement on the wife was the wife's interest a mere life-interest; that in such settlement a provision was always made for the children, but here the children were already provided for, because the principal was to be divided among the children upon the death of the wife. *Hardinge and Romilly*, for the defendants *Mason* and his wife, argued that an assignee by deed for a valuable consideration of the wife's fortune, must, when he sues for that fortune, in equity make a settlement on the wife; and they relied on the dictum of Lord *Hardwicke*, in *Jewson v. Moulson*, 2 Atk. 417., and on *Pope v. Crawshaw*: that the assignment, however, in this case was not to be considered as a particular assignment for valuable consideration, but as an assignment in bankruptcy. In *Jewson v. Moulson*, one of the assignments was to trustees, for the benefit of all the husband's creditors; and of that assignment Lord *Hardwicke* said, fo. 422.: 'It does not differ from the case of assignments of bankrupts, for it is the case of a failing man, and exactly under the same reasoning as an assignment of a bankrupt's effects for his creditors in general.' That, in point of principle, there was no distinction to be taken between the case of a life-interest of a wife and a gross sum of money, and that in the case of *Vandenanker v. Desborough*, 2 Vern. 96., which they cited from the *Registrar's* book, and *Ex parte Coyegame*, 1 Atk. 192. & *Cooke*, B. L. [213. 6th ed., 265. 5th ed.,] where it is stated, from the *Secretary's* book, the whole of the wife's life-interest was secured by the Court for her separate use.

The *Master of the Rolls* said, he thought that the plaintiffs in this case stood exactly in the same situation as assignees of a bankrupt, and that a husband or his assignees ought to be compelled to make a settlement in case of a life-interest of his wife, as well as of a sum in gross, but he could not follow the precedents which had been cited, and saw no reason to give the wife the whole; and he recommended it to the parties to agree upon a settlement, and ordered the cause to stand over for that purpose, and said that if no agreement was entered into he should refer it to the Master to approve of a proper settlement."

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in principle, it could not fall within the rule; because, if it was considered as intended for her maintenance, the husband had fairly bought it by his obligation to maintain the wife, as well as to pay her debts.

Mr. *Hardinge* and Mr. *Romilly* contended, first, that, under the will, her equitable interest was to be considered as *her own*, and payable to her separate use, as between her and the assignees of her insolvent husband.

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That if a trust was created by deed or will for *annual* payments to a wife so described, that species of trust indicated, upon the [\*] face of it, a purpose to disable the marital controul of the husband over the annual provision.

They admitted the case of *Lee v. Prieux* (*ante*, vol. iii. p. 381.) to have been determined upon the supposition, that no separate use of the wife could there have been deemed within the purpose of that instrument, unless it had been superadded that her single receipt should be a discharge; but they argued, that the words there added were here implied.

Having said they were to look at the *intention*:—they laid stress upon the direction of annual payments to the wife so described; there could be no middle intention; the testator meant the wife and husband should have it between them, or he meant the wife should have it alone. If he meant the former, he would have directed the use for the husband and wife during their joint lives. In directing payments to her, he directs and authorises payment into her hand. By authorising that payment, so as to indemnify those who make it, he means to guard the payment against the husband.

They said, if the additional words here had been *for her livelihood or maintenance*, it would not be a point of any doubt, that her husband could not have parted with it: that here these words were clearly implied.

But they laid more stress upon their second proposition, by which they contended, that if no separate use could be found in the will, yet these plaintiffs could not recover the dividends.

That it was, in principle, the case of a bankrupt, in which they insisted that authorities would be found against a similar claim.

They cited *Vandenanker v. Desborough*, 2 Vern. 96., which report they confirmed in substance from the register's book.

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[\*] There 800*l.* was put in trust for the purchase of land, which land was to be settled so as that, after the death of the wife of *I. S.*, it should go to her children, and the interest of the fund should go as the profits of the estate were to go. *I. S.* became a bankrupt. The assignees demanded the interest of the fund during the joint lives of the husband and the wife. It was refused, and the court said this was intended as a trust for the wife, by a relation, and was intended for her maintenance. They ordered that her trustee should have it for her separate use, *without enquiry* before the Master into her circumstances; or if any, and what settlement had been made upon her.

They insisted that, between assignment by operation of law, and assignment by deed, there was no difference; which they proved by the case of *Grey v. Kentish*, 1 Atk. 280.

They cited *ex parte Coysegame*, 1 Atk. 192. and 1 Cook's Bankrupt Law, page 323. as a case in point.

There the bankrupt's wife, before she married, bought of Sir *Edward Smith* an annuity of 40*l.* a-year, for the joint lives of herself and the seller.

*Smith* executed a bond to *Wear* for the payment of this annual sum to him, *Wear*, to receive it in trust for the purchaser. *Smith* also gave a warrant of attorney, &c.

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The husband, upon his marriage, took the bonds, and received the arrears till his bankruptcy.

Upon his last examination he gave them up. The assignees were going to sell the annuity, and pay the purchase-money amongst creditors, without provision for the wife: she applied, and the Court ordered that the annuity should be kept on foot for her sole and separate use, to maintain her and her child. The securities were put into the hands of her trustee.

They also contended the permission as to the continuing receipt of the dividends by the wife, as an implied waiver of any [\*] such claim on the part of the assignees, who were now sweeping away the whole, without an offer of one shilling for her and for her children. They called this permission fraudulent.

At the worst, they demanded a reference to see what settlement the husband had made, but thought it ripe for a decision that she was to keep these dividends, inasmuch as they were intended for her provision, independent of her husband, which his assignment should not affect, so as to deprive her of the benefit.

Mr. *Mitford*, after a discussion of the two cited cases, which he represented as being inaccurate or very erroneous, admitted that if the wife's claim had been to a principal sum, the demand of the reference to the Master could not be resisted; but attempted a distinction between her claim to interest and principal.

Master of the Rolls.

This is a *general* (4) assignment by *William Mason*, of all his effects to the plaintiffs, in trust for his creditors; and it comes to this, whether, the assignees are entitled to the interest of the funds for the life of the wife. The assignment in this case, being equivalent to an assignment in law by bankruptcy, (4) I cannot see why the Court should not admit the same equity of calling on the assignees, to make a provision for her. The assignees are not entitled to the annuity, without making such provision, 1 Atk. 192. If the parties cannot agree, I can only say I cannot assist the assignees to get it, without their making a provision.

His Honor therefore referred it to the Master, in order that the assignees might make an offer.

(4) Although it was doubted at the time of this decision whether a wife's equity would prevail against a particular assignee from the husband for valuable consideration. (See in *Worral v. Marlar*, 1 Cox, 158., 1 Cox, P. W. 459. note, and 11 Ves. 20.) It seems now considered that such an assignee must make a settlement upon her. See 1 Roper, Bar. & Feme, 266, 267. &c., citing *Earl of Salisbury v. Newton*, per Lord Northampton, 1 Eden, 370., *Jewson v. Moulson*, 2 Atk. 417., *Like v. Beresford*, 3 Ves. 511., *Macaulay v. Philips*, 4 Ves. 19., and *Franco v. Franco*, *ibid.* 530. See also per Sir W. Grant M.R. in *Wright v. Morley*, 11 Ves. 20. &c., and *Beresford v. Hobson*, 1 Madd. Rep. 373.

[\*] SHAWE *against* CUNLIFFE.

(Reg. Lib. 1792. B. fol. 97.)

THE facts of this case, amongst other things, were these. (1)

Sir *Ellis Cunliffe*, by will dated 14th April, 1764, bequeathed as follows: "I do hereby direct my executors hereinafter named, to lay

depends on a contingency, the intermediate interest between the death of tenant for life, and the contingency happening, does not follow the principal, but falls into the residue. (2)

(1) Most of this report is taken from Lord Colchester's notes.

(2) *Vide Wyndham v. Wyndham*, *antea*, 3 vol. 58., and 2 Roper on Legacies, 200. et seq.

out

1792.

PATER  
against  
HILL.

[ \*143 ]

[ \*144 ]

Lincoln's Inn  
Hall, 10th, 11th  
December.

Lords Com-  
missioners  
*Eyre, Ashurst,*  
and *Wilson.*

Where a legacy

1792.

SHAWE  
against  
CUNLIFFE.

[ \*145 ]

out and invest the sum of 1000*l.* part of my said personal estate at interest, on real or government securities, or parliamentary funds, and from time to time, to pay the dividends, interest, and proceeds thereof, as the same shall become payable, to my brother *Shawe* and my sister, his wife, (meaning *William Shawe* and *Anne* his then wife, and now his widow,) and the survivor of them, during their respective lives, and after the death of the survivor of them, then to call in the said principal sum of 1000*l.* and to pay the same to all and every their daughter and daughters, and younger son and sons living at the time of the decease of such survivor, equally to be divided between or amongst them (if more than one) share and share alike; and if there shall be but one such daughter or younger son living, then to such one daughter or younger son. Also I direct my said executors to lay out and invest the further sum of 1000*l.* other part of my said personal estate at interest, on such security as aforesaid, and from time to time to pay the interest, dividends and proceeds thereof, as the same shall become payable, to my sister *Mary Cunliffe spinster*, during her life, and after her decease, to call in the principal money, and pay the same unto all and every her daughter and daughters, younger son and sons, living at the time of her decease, equally to be divided between or amongst them (if more than one) share and share alike; and if there shall be but one such daughter or younger son then living, then to such one daughter or younger son. And if my said sister shall have no such daughter or younger son living at the time of her decease, then to my said brother and sister *Shawe's* daughter and daughters, and younger son and sons, in such and the same manner as the said first mentioned sum of 1000*l.* is hereinbefore directed to be paid to them. And in case any such daughter or [\*] daughters, or younger son or sons of my said brother and sister *Shawe*, or my said sister *Cunliffe*, shall at the time of the decease of their respective parents, be infants under the age of twenty-one years, and such daughter or daughters shall be then unmarried, then the share or shares of him, her, or them, shall be paid to his, her, or their guardian or guardians for the time being, whose receipt and receipts shall be a sufficient discharge to my said executors for the same. And in case my said brother and sister *Shawe* shall depart this life, without having any such daughter or younger son living at the time of the decease of the survivor of them, then, as well as the first mentioned sum of 1000*l.* as also the last mentioned sum of 1000*l.* in case of the decease of my said sister *Mary Cunliffe* leaving no daughter or younger son then living, shall go and be considered as part of the residue of my personal estate.

And after giving some pecuniary legacies, the said testator gave and bequeathed the residue and remainder of his personal estate, to his said executors, in trust for his eldest or only son: and in case he should leave no such son, or he should leave such son, and such son should die without lawful issue of his body, before he should attain the age of twenty-one years, then the said testator by his said will, disposed of other part of his said personal estate, in the words or to the purport and effect following, viz.

*But in case I leave no such son*, or that I leave such son, and he should happen to depart this life without lawful issue of his body, before he shall attain the age of twenty-one years, then I do hereby give and bequeath the interest of the further sum of 4000*l.* to my said brother and sister *Shawe* respectively, for their several lives; and after the decease of the survivor of them, then the principal sum to be divided amongst such their child or children as aforesaid, which failing, the said 4000*l.* is to sink into the residue of my personal estate: and to my said sister *Mary*, the interest of the further sum of 4000*l.* during her life, and after her decease, the principal to such her child or children as aforesaid; and if no such child

child or children; then to my said brother and sister *Shawe's* children as aforesaid, which failing, the said 4000*l.* also to sink into the residue of my personal estate.

[\*] And the said testator thereby gave and bequeathed, *all the rest and remainder of his personal estate unto his brother Robert Cunliffe, afterwards Sir Robert Cunliffe*, his executors, administrators and assigns; and after disposing of his real estate as therein mentioned, the said testator did appoint his said brother, the said *Sir Robert Cunliffe*, *Thomas Hunt*, *Thomas Marsden*, and *John Blackburn*, Esqrs. executors.

On the 16th of October, 1767, *Sir Ellis Cunliffe* died, leaving Dame *Mary Cunliffe* his widow, and two daughters.

Questions arising upon this will, *Sir Robert Cunliffe* in 1768 filed his bill; and a decree was made on the 7th of May 1770; and (*inter alia*) the said legacies of 1000*l.* and 4000*l.* were ordered to be paid into the Bank, and laid out in 3 per cents. and the interest of one set of legacies of 1000*l.* and 4000*l.* was ordered to be paid to *Shawe* and wife for their lives, and the life of the survivor; and the interest of other two legacies was ordered to be paid to *Mary Cunliffe*; with liberty, at their several deaths, for the other parties who should be intitled, to apply; the clear residue was declared to belong to *Sir Robert Cunliffe*.

These legacies being invested in 11,544*l.* 3 per cents. part of it was afterwards by order of Court laid out in a mortgage, to the amount of 6000*l.* and the rest being 4735*l.* 9*s.* 3*d.* 3 per cents. remained as before.

*Sir Robert Cunliffe*, executor of *Sir Ellis Cunliffe*, afterwards died, and appointed *Sir Foster Cunliffe* and others his executors.

In 1785, *Mary Cunliffe* died unmarried and without issue. In 1791, *Anne Shawe*, having survived her husband, died also, leaving at her death *Joseph Shawe*, her only younger son, and *Mary Walmsley*, and *M. H. Whitehead*, her only younger daughters living at her death.

And now the question was made on the part of *Ann Shawe's* younger son and daughters, whether they, who now became intitled to *Mary Cunliffe's* 1000*l.* and 4000*l.* were not also [\*] intitled to the intermediate interest, which had accrued thereon between the death of *Mary Cunliffe* in 1785, and the death of *Ann Shawe* in 1791. On the other hand, *Sir Foster Cunliffe, &c.* as executors of *Sir Robert Cunliffe*, who was executor and residuary legatee of *Sir Ellis Cunliffe*, contended, that such intermediate interest was undisposed of, and fell into the general residue of *Sir Ellis Cunliffe's* estate.

*Mr. Solicitor General* and *Mr. Ainge*, for the plaintiffs. This is a question of intention. The testator has distinguished these legacies, and separated them from the general residue of his property. The residuary legatee can only say this interest was never given away from him, and therefore it belongs to him as undisposed: but on the contrary, it was clearly given away during the life of *Mary Cunliffe*, and therefore, by the testator's intention, it should continue to remain separate; and should accumulate for the successive legatees when they became intitled to payment.

They cited *Green v. Ekins*, 2 Atk. 473, *Nicholls v. Osborn*, 2 P. Wms. 419, *Chaworth v. Hooper* (*ante*, vol. i. 81.) but they chiefly relied upon *Ackerly v. Vernon*, 1 P. W. 783, and *Bourne v. Tynte*, which is cited there, and also reported in 2 Vent. 346. and they argued the present bequest to be a special residue, which must therefore carry all its own fruits along with it.

*Mr. Mansfield*, *Mr. Stanley*, and *Mr. Abbot* for the defendant *Sir Foster Cunliffe, &c.* representatives of *Sir Robert Cunliffe* the residuary legatee of *Sir Ellis Cunliffe*.

The facts touching this question, according to the events which have happened, are few and plain. Upon the death of *Mary Cunliffe* in

1782.

*Sir Robert Cunliffe*  
[ \*146 ]

[ \*147 ]

1792.

SHAWE  
against  
CUNLIFFE

[ \*148 ]

1785, the legacies of which she had the life interest, could not be paid to any person, until it should appear who would be the younger sons and daughters of *Shawe* and wife, at the death of the survivor of them. *Ann Shawe* having survived her husband, upon her death in 1791, those persons were ascertained, and then there was an arrear of six years' interest, viz. about 1200*l.* to be paid to somebody.

[\*] The general rule of law upon this subject, is also clear; and it shows, that this intermediate interest could not belong to the younger son and daughters, whose title to the principal, accrued only in 1791.

Interest is for forbearance; but there can be no forbearance where there is no right; and it must be of a vested right, that the exercise is forborne. But in the present case, no right was vested in any person during the whole of this intermediate period. It was purely contingent, and of course all intermediate profit, being undisposed of, must sink into the residue.

As to the cases cited by the plaintiffs, they do not apply, or as far as they apply they do not conclude against the residuary legatee; and besides these, there are other express decisions in his favour.

Undivided rents, and undisposed interest, stand upon very distinct grounds; but this is the interest of a personal fund.

Of personal legacies, the intermediate interest may come in question, either on vested legacies, or on contingent legacies.

As to *vested* legacies, 1st. If the gift be present, but the payment be postponed, and the legatee dies before the day of payment; clearly this intermediate interest falls into the testator's residue: to this point are *Laundy v. Williams*, 2 P. W. 478. and *Heath v. Perry*, 3 Atk. 101. 2dly. If the gift be present, but the payment postponed, with a bequest over in case of the legatees dying before the day of payment, there, if the first legatee die before the day, the rule differs, and the intermediate interest is to be paid to the representative of the first legatee for so long as he lived, and the subsequent interest to the remainder-man: to this point are *Acherly v. Vernon*, and *Chaworth v. Hooper*, already cited by the present plaintiffs: as to *Bourne v. Tynte*, it is to be noted, that Lord *Hardwicke*, in *Heath v. Perry*, 3 Atk. 101. expressed his strong disapprobation of it. 3dly. If the gift be present, and payable immediately, but defeasible on a condition subsequent, with a remainder over; then the intermediate interest is payable to [\*] the first legatee, till the legacy is divested; after which, it goes of course to the remainder-man: to this point are *Nicholls v. Osborn*, 2 P. W. 419., *Taylor v. Johnson*, 2 P. W. 504., and *Hawkins v. Combe* (*ante*, vol. i. p. 335.) And thus it appears, that most of the authorities cited by the plaintiff, being referable to vested legacies, do not apply to the present question.

[ \*149 ]

As to contingent legacies, such as the present is, they may be either of particular sums, or of a residue; and these are governed by opposite rules as to interest.

We agree that a contingent legacy of a residue, carries with it all intermediate interest; and that is, because of the general nature of a residue, which involves all not expressly given away: such interest goes not *quâ* interest, attached to the body of the legacy *quâ* legacy; but it goes with the legacy, and in the same course, because it has no other into which it can go: to this point, is *Green v. Ekins*, 2 Atk. 473. cited by the plaintiff, and which is the only remaining authority of those which they have cited.

But this is a contingent legacy of a particular sum, and not of a residue. Such legacies carry no intermediate interest. Lord *Hardwicke*, in *Green v. Ekins*, expressly distinguishes these from the former: and in *Haughton v. Harrison*, 2 Atk. 329. which was a legacy of a particular

ular sum, Lord *Hardwicke* refused to give the intermediate. There is a modern case of † *Descrambes v. Tomkins*, where a was [\*] given to several children payable at twenty-three, and died before twenty-three, the legacy was to sink into the residue. The cases were cited at the hearing, and it was held as an established principle, that where the legacy is contingent, it does not vest any, and none was decreed. But what decides this case, as an authority in all points similar, is *Wyndham v. Wyndham* (*ante*, vol. iii. where it was attempted, as at present, to call the legacy a star residue, and thereby to attract to it the qualities of a general, for the purpose of carrying interest; but Lord *Thurlow* refused to reject such a distinction, considering it as a mere particular legatee's legacy. As to the point of severance from the residue, this is never severed, except as it was necessary to pay the interest to *Cunliffe* for life, and afterwards to Mrs. *Shawe*, but for no other; and in case of the death of Mrs. *Shawe* without children, it was to fall into the residue; and it is not to be compared with cases, where 500*l.* is given to *A.* and the residue to *C.* as in the case of *Acherley v. Vernon*, where, *ex vi termini*, there was a severance, not here severed from the residue, till the event shall actually happen; nothing is given but to such younger children of Mrs. *Shawe* living alive at Mrs. *Cunliffe's* death) as shall survive. The interest must fall to the residuary legatee as undisposed of.

† Commissioner *Eyre*.—Two circumstances strike me, as necessary to be considered in the decision of this case: the construction of the will, and then what is the rule of the Court with respect to the interest of 1000*l.* and 4000*l.* It has been contended, that the true construction is, that the 1000*l.* and 4000*l.* were to go to the children, in the same manner in which the 1000*l.* was limited to them, viz. the death of their father and mother; and consequently not devised to such children as should be living at the death of the father and mother, but upon the death of the survivor. The words, "and in the same manner as hereinbefore directed to be paid," import that to be the true construction. Why the testator have devised the money in that manner, and forgot to give a life to Mr. and Mrs. *Shawe*, in the same manner as the other sums are given to them, it is impossible to say; or why he does not give the [\*] property to such children as are living at the death of *Cunliffe*, instead of postponing it to the death of Mrs. *Shawe*; and does not well know how to reconcile these expressions of the will, with the former expressions, "in case my brother and sister

1792.

SHAWE  
against  
CUNLIFFE.  
[\*150]

[\*151]

## † DESCRAMBES V. TOMKINS. (3)

Petition, *Lincoln's Inn Hall*, August 5, 1784.

or gave by will to *A. B. C. D.* and *E.* 500*l.* each, to be paid them at their respective ages of twenty-three years, and if they should die before that time, then their legacies were to sink into the residue of the personal estate. The five legatees, namely, maternal grand children of the testator, though not so described in the will, their father was alive, but in very bad circumstances; and it was prayed, by the petition, that the five legatees might be allowed interest upon their respective legacies till they attained twenty-three years, and that such interest might be paid to them for their maintenance in the mean time. And Mr. *Pryce*, in support of the petition, cited 1 Ch. Rep. 140. *Harvey v. Harvey*, 2 Wms. 21. *Acherley v. Vernon*, 183. *Nicholls v. Osborn*, 2 Wms. 419. *Taylor v. Johnson*, 2 Wms. 504.

*Chancellor*.—The case of *Nicholls v. Osborn*, is the only case applicable to this; it is rather a case of a present gift, with an executory devise upon it; and the case is where the legacy is given presently, but if the legatee shall die before a certain time, then over, and where it is given at a future time as in this case. No interest can be allowed in this case.

From the notes of Mr. Cox; and lately reported 1 Cox, Ca. Ch. 133.

H 2

"Shawe



1792.

SHAWE  
against  
CUNLIFFE.

"Shawe should depart this life without such, &c. then I will that the first mentioned sums, as well as the last, shall go and be considered as part of my personal estate." The testator limits over these sums intended for the children, in the event of the father and mother dying without leaving children, and he must be understood to have given the 1000*l.* to the children in the same event, if the will is to be consistent: it would be too absurd to give this sum to the children immediately in the lifetime of Mrs. Shawe. The counsel for the plaintiff have altered some words of the will, and attempted to reject others, to favour this latter construction; but it is not easy to maintain it upon the former part of this instrument, and taking every part of it into consideration, it would be too much for the Court to say, upon a view of the whole of it, that the testator had, in any part of it, shown an idea of making any other provision than for those children who should survive the father and mother; and they being the objects of his bounty, he did not intend any other bounty to any other person; and it would be doing violence to the words of the will, to put any other construction, for the clause is this, "to such daughter, &c." and the gift was clearly upon the death of Mrs. Cunliffe, only to the same persons, as were to take the 1000*l.* legacy to such daughter and daughters, son and sons, as should be living at the death of Mr. and Mrs. Shawe, or the survivor of them. Then we are, consequently, driven into the second question, by the event having happened, that the money does not go over; a circumstance which gives rise to the point of interest, whether it shall be considered as belonging to these legatees, as it annually arises; or whether to accumulate, as payable with the principal; or whether it shall not, on the contrary, fall into the residue. This property was originally separated from the bulk of the residue, so as to make it a *productive fund*, the interest of it being payable to Mrs. Cunliffe for life; and that was the thing intended to go to the children, in the event of their surviving: and why (as Lord Hardwicke in *Green v. Ekins* expresses it) the tree and its fruit should not go together, in point of reason, I cannot say, as in the case of any specific [\*] gift; but still the authorities oblige us to hold a different language, and seem to have hitherto gone upon a different principle. They all have, without exception, so held it, and *Wyndham v. Wyndham*, determined by Lord Thurlow, has closed the question, that if there be a *fund*, whether residuary or particular, given to A. for life, and afterwards, upon a contingency which does not take effect upon the death of the tenant for life, the intermediate interest is an interest undisposed of, and therefore falls into the residue; this is the technical rule decidedly established by that authority, and must be conclusive; and no settled distinction between a general residue, or a particular part of a residue severed for the purpose of being a productive fund, so as to create an effectual interest to the tenant for life, has prevailed. Therefore the plaintiff cannot prevail in the present claim, but the interest must be considered as undisposed, and be declared to fall into the residue for the benefit of the defendants.

Lord Commissioner Ashhurst. — From the language of this will, it is clear that the testator never adverted to the possibility of Mrs. Cunliffe's dying before Mrs. Shawe; and it is impossible to infer, from the words of the clauses which have been so much relied upon, that he meant that *this interest* should go to the children, for we cannot collect that intent, otherwise than from the expressions which he has thought proper to use in this instrument. We are not to decide by what he was supposed to mean, but by what he has actually said. It would have prevented litigation, if, in all cases, whether of a vested or contingent fund, where the interest *had been undisposed of*, it had been decided to fall into the residue, where there is a residuary clause: but, as to a contingent gift, it

it has been uniformly so held. *Heath v. Perry*, *Wyndham v. Wyndham*, *Descrambes v. Tomkins*, have decided, that where the interest is not actually given, the party cannot have it; because the *principal* itself cannot be claimed, as vested; and though it might have been a reasonable thing to have given this interest to the children, I must agree upon the settled principles as laid down in the above authorities, that we are not competent to consider them as entitled to the interest.

Lord Commissioner *Wilson*.—However I may be inclined to suppose, from the former clauses of the will, that the testator [\*] intended to give a *vested legacy* to these children, the words of the latter clause respecting the 2000*l.* being such younger children as should be living at the death of the survivor, make that construction impossible: at the death of *Mrs. Cunliffe*, it may have the appearance of a vested interest, but, surely, subject to be *divested* in the event of those children dying in the life-time of the father and mother. This is the *natural* construction, for if vested, it would go to *their representatives*, or be disposable among all the other children; therefore we cannot construe it an absolute vested interest, but contingent; and as to *its value*, limited to a certain sum, 5000*l.* being the utmost bounty which this testator has given. If we decree the interest, we do more than he has meant to do, according to the expressions used by him in this instrument; it would, hereafter, turn out to be considerably more than the sum so given, and the Court would go beyond the intention of the testator. The interest therefore of this gift is not to be given to these children as it *arises*, nor can it *accumulate*, but must sink into the general residue.

1792.

SHAW  
against  
CUNLIFFE.

[\*153]

### MAKEHAM against HOOPER and Others.

(Reg. Lib. 1792. B. fol. 145.)

**JOSEPH LLOYD** seised of freehold and copyhold estates, and possessed of leasehold and other personal estates, made his will dated 5th of May, 1781, duly executed, and thereby gave to the defendants *Hooper* and *Foster*, their heirs, &c. all his freehold, leasehold, and copyhold estates, and also all his personal estates, upon trust to sell and dispose thereof, and out of the monies arising therefrom, to pay (amongst others) 200*l.* to the *Bath* infirmary, and other charitable legacies, to the amount in the whole of 1200*l.* also 200*l.* to erect a monument to the memory of *John Curle Esq.*; and after payment of several pecuniary legacies to persons therein named, to pay the residue and surplus of the monies arising from the testator's real and personal estates, unto and between the plaintiff and *Daniel Evans*, as and for their own property, and made the plaintiff and *Evans* executors.

[\*] *Daniel Evans* died in the life-time of the testator.

By a codicil to the will dated 9th of November, 1781, after some other legacies, he gave to two of the defendants 100*l.* in trust, for another charity (but without naming any fund out of which it was to be paid) and ordered a monument to be erected to himself.

He afterwards made a second codicil, by which he gave some legacies, and died November, 1781, leaving plaintiff his surviving executor and

Lincoln's Inn  
Hall, 15th December.

Lords Commissioners  
*Ashurst* and  
*Wilson*.

Court will not  
marshall assets  
to pay charity  
legacies. (1)

[\*154]

(1) *Vide Attorney General v. Earl of Winchelsea*, ante, 3 vol. 374. et seq., and the Editor's notes, *ibid.*; and 380. from the MS. of Mr. *Le Mesurier*: and see, in particular, *House v. Chapman*, 4 Ves. 542. 550., and *Curtis v. Hutton*, 14 Ves. 537. et seq.

1792.

MAKENHAM  
against  
HOOPER.

residuary legatee, and two other of the defendants, his heir at law and next of kin, who had assigned their claims to the plaintiff.

The bill prayed that the will and codicils might be declared to be well proved, and the trusts thereof carried into execution; and for an account of the testator's personal estate, come to the hands of the executors and trustees, and of his debts, legacies, and funeral expences (except the charitable legacies) and that the charitable legacies might be declared to be void, and to fall into the residue; and that the real estate might be sold, and the clear residue of the monies to arise by the sale, and also of the testator's personal estate might be declared to belong and be paid to the plaintiff as residuary legatee.

The cause was heard before the late Lord Chancellor, 24th of February, 1784, when a decree was made by which the will and codicils were declared to be well proved, and that the same ought to be established, and the trusts carried into execution; and it was referred to the Master to take the proper accounts, and to distinguish what arose from chattels personal, and chattels real; and he reserved the consideration, whether the charity legacies were to be paid, and how and in what manner, and all further directions, till after the Master should have made his report.

[\*155]

On the 26th of June, 1792, the Master made his report, by which it appeared that the money come to the hands of the plaintiff, and the trustees, amounted to 1968*l.* 7*s.* 7½*d.* and [\*] that they had paid 1037*l.* 15*s.* 5*d.*, so that there remained a balance of 950*l.* 12*s.* 2½*d.* The testator, by his will, gave legacies (besides the charitable ones) to the amount of 4490*l.* so that the personal estate fell short of paying the same by 3539*l.* 7*s.* 9½*d.* the real and leasehold estates sold for above 6000*l.*

The cause now came on for further directions.

Mr. Solicitor General and Mr. Richards, for the plaintiff.

In this case there are charitable legacies to the amount of 1300*l.* The freehold, leasehold, and copyhold, are directed to be sold to pay the legacies. But the charitable legacies cannot be paid, unless the Court will marshall the assets, by throwing the other legacies on the real estate. If there is a clear personal estate sufficient for the payment of them, it is impossible to say that the charitable legacies must not be paid: but in order to pay these, the whole fund must be divided among the legatees (including the charities) *pro rata*. It is not necessary to cite cases to show that the Court will not marshall legacies for a charity. It has been settled, however, in *Middleton v. Spicer*, (*ante*, vol. i. p. 201.) and *Attorney General v. Earl of Winchelsea*, (*ante*, vol. 3. p. 373.) The rule is, that what the charity cannot take *per directum*, it shall not take *per obliquum*.

Mr. Attorney General, Mr. Mansfield, and Mr. Hardinge, for the defendants.

[\*156]

We must admit that the cases cited have been so determined, certainly they are against a great many others, and against the principle of marshallng assets, which is as applicable to charitable, as other legacies. It is as contrary to common law, that simple contract creditors should be paid, in any case, out of land; the only difference is, that in the one case it is by the common law; in the other, by the statute, which says, charities shall not take charges on land. In the *Attorney General v. Tompkins*, Amb. 216. the reason for marshallng assets is given *ut res magis valeat quam pereat*; and in the *Attorney General v. Caldwell*, S.B. 635., [\*] the Court was of opinion that the assets ought to be so marshalld, as to let in the charity legacies. In the *Attorney General v. Graves*, Amb. 155., it appears to have been the opinion of the Lord Chancellor, that assets might be marshalld to pay the charitable legacies.

In

*Attorney General v. Tindall*, Amb. 614. but more fully reported in *re on Mortmain*, p. 106. the reasoning is perhaps defective; how detrimental to lay out money in employing industrious labourers and farmers in the improvement of land does not appear: but that case it apply. It is said here that you shall not do that *per obliquum*, you cannot do *per directum*; this is not so here, it is only the portion of the whole fund produced to the intent of the testator. If the charities cannot be paid out of the real estate, they may out of personalty. The last case at the Rolls was determined the other way because the mortgages made a part of the general residue.

*Solicitor General*, in reply.

cases which have been decided, must form the rule of the Court. It is certainly, in every case, that the Court will marshal assets for payment. Where a legacy is given out of a mixed fund, and to be paid in time, it partakes of the nature of a charge, and the party can only have a portion of the personal estate. The question has been decided against marshalling assets for a charity, in the case of *mort- Attorney General v. Meyrick*, 2 Ves. 44. *Attorney General v. (Highmore 95. n.) Middleton v. Spicer*. Your Lordships will follow the decision of a superior Court, before you will decide against it.

Commissioner *Ashhurst* said, he thought they were bound by former cases, with respect to the question of marshalling; that it did not appear what was the reason of the turn in the cases, but as the decision had been taken that course, they could not alter them.

The legacy to the *Bath infirmary*, was ordered to be paid, in consequence of an act of parliament of 19 Geo. 3. permitting that charity to take out of mortmain.

1792.

MAXHAM  
against  
HOOPER.

[\*] General Order, [15th December.] (1)

[ \*157 ]

(Reg. Lib. 1792. B. fol. 33.)

Lords Commissioners and Master of the Rolls made an order, that the Masters, on the Second Seal after *Trinity* Term, in every year, shall certify to the Lord Chancellor, or Lords Commissioners of the Great Seal, the state of the receivers' accounts in their respective

[General order for Masters to certify annually the state of receivers' accounts. (1)]

as this order in Mr. Beames's very valuable edition of the Orders in Chancery,

Earl of CHOLMONDELY against The Earl of ORFORD.

(Reg. Lib. 1792. A. fol. 35.)

*Stratford* moved, that two persons might be examined *de bene esse*, as being the only persons who had knowledge of the material facts without stating their age. He cited the cases of *Bridges v. Bridges*,

the only persons who knew material facts. (1)

Lincoln's Inn  
Hall, 16th De-  
cember.

Lords Com-  
missioners  
*Eyre, Ashhurst,*  
and *Wilson*.

Two witnesses  
ordered to be  
examined *de*  
*bene esse*, being  
the only persons who knew material facts. (1)

see *Hawkins v. Middleditch*, *antea*, 2 vol. 641., with the Editor's note; and  
see *Lord Milford*; *postea*, 540.

H 4

and

1792.

Earl of  
CHOLMONDELY  
against  
The Earl of  
OXFORD.

and *Jenkins v. Turner*, mentioned in *Hankin v. Middleditch*, (*ante*, vol. ii. p. 641.)

Lords Commissioners made the order.

CREUZE *against* LOWTH.

MICHEL *against* HUNTER.

(Reg. Lib. 1792. A. fol. 91.)

*Lincoln's Inn  
Hall, 18th Dec.*  
Lords Com-  
missioners  
*Eyre, Ashhurst,  
and Wilson.*

Interest ordered  
to be computed  
and paid, on  
sums reported  
due, from the  
date of the  
report. (1)

[\*158]

A PETITION in the above two causes, by which it was prayed, that the Master might be directed to compute interest on the petitioners' demands reported due to them prior to the marriage settlement of *Charles Orby Hunter* deceased, from the date of the report (except as to certain sums) and that the sums might be raised in the same manner with the sums reported due, and that the sums reported due to the petitioners might be paid to the petitioners with interest, and with interest for the same from the date of the Master's report.

[\*] The petitioners stated, that by decree, dated 15th of *November*, 1786, it was ordered, that the Master should enquire into, and state the priority of the several incumbrances affecting the real estates in question, and take an account of what was due thereon: that the Master by a schedule to his report, dated 21st of *February*, 1789, stated the priorities and sums due accordingly; and by an order dated 18th *July*, 1789, it was ordered, that what was reported due to the several incumbrancers who had charges on the estates prior to the marriage settlement, should be raised by mortgage or sale of the estates, and should be paid to them respectively; and it was referred to the Master, whether it would be most for the benefit of the defendant *Thomas Orby Hunter* (the infant tenant in tail) to raise the same by mortgage or sale, or by sale and mortgage: that *Charles Orby Hunter* died in *September*, 1791; that the incumbrances reported due to the petitioners respectively prior to the marriage settlements of *Thomas Orby Hunter*, to the date of the Master's report, amounted to the sum of 35,295*l.* 10*s.* 11*d.* and that no part thereof had been paid, except that certain of the petitioners had received interest upon two sums of 5000*l.* each, in part of the sums reported due to them: that the petitioner *Jacomina Hunter* is the widow of *Thomas Orby Hunter*, the former owner of the estates in question, and far advanced in years, and has no other provision than the annuities given by the will of the said *Thomas Orby Hunter*, and charged on the said estates, for the arrears of which, amounting to 5953*l.* 12*s.* 11*d.* she is reported a creditor by the said Master's report; that the petitioners, since the date of the said report, as well as previous thereto, and particularly the said widow have been under the necessity of borrowing money at interest, upon the credit of the several sums reported due to them by the said Master's report, for their necessary support and maintenance: and if the sums reported due to them, had been raised at the date of the report, the petitioners would have received the same, and

(1) This order was discharged as erroneous, by Lord Loughborough C., about six months afterwards. *Vide postea*, 316., and S. C. 2 Ves. jun. 157.; and see *Turner v. Turner*, 1 Jacob & Walk. Rep. 39. *et seq.*, the Editor's note (2) to *Tew v. Earl of Winterton*, *antea*, 3 vol. 499., and the Editor's note to *Bickham v. Cross* (2 Ves. 471.) in the Supplement to Vesey senior, p. 388.; *Anderson v. Dwyer*, 1 Scho. & Lefroy. 301, &c. &c.

made interest thereof, and the estates would have been charged with interest on the sums so raised from that time; they therefore conceived themselves to be entitled to interest (except as to the sums on which interest had been paid to certain of the petitioners) and prayed as above stated.

[\*] Mr. Selwyn, Mr. Mitford, and Mr. Grimwood, in support of the petition, insisted, that, in this case, the sums due to the petitioners had been ascertained by the Master's report; and that there have been cases in which the effects of a Master's report of sums due has been considered as equivalent to a decree, and interest has been allowed from that time. The *Attorney General v. The Brewers' Company*, 1 Wms. 376. is a case in point, and the reason is given in *Brown v. Barkham*, 1 Wms. 653. In the case of mortgages, interest is given on the aggregate sum reported due, though that sum includes interest. *Bickham v. Cross*, 2 Ves. 471. (2) The Court there seemed to think the giving of interest was in their discretion, and referred to a case of *Astley v. Powis*, which is reported 1 Ves. 495. where interest was ordered on the accumulated sum reported due, although a decree is not equal to a judgment at law for the purpose of binding lands. And in the *Treatise of Equity*, 120. it is laid down, that interest shall be allowed, on a stated account, more strongly when settled by a Master. In the present case, a very large sum is due as an incumbrance upon this estate, which has been decreed to be paid ever since 1786, by sale or mortgage, and the delay has only been in order to consider which mode would be more convenient to the parties; and with respect to Mrs. Hunter, the widow, the sum reported due to her is her only subsistence. The other parties have been kept, by the delay, out of money, of which, if it had been paid, then they might have made interest.

Mr. Mansfield, on the other side.

The giving interest, in this case, would be a new decision, and such as I never knew an example of: interest was not given by the decree, and the debts, in their own nature, were not such as to carry it. All the cases cited are cases of debts which, in their own nature, carried interest. The only question here is, whether interest shall be computed on the principal and interest, or on the principal only. Here no interest is ordered, which would have been, by the decree, if it had been proper they should carry interest. In this case all the petitioners are annuitants, who purchased their annuities at six years' purchase; and all their debts are due for arrears of such annuities, except Mrs. Hunter's, who has been, herself, guilty of [\*] great delay. *Bickham v. Cross* is a very difficult case. (2) The only question was, whether interest should be calculated on the whole sum. The same was the question in *Brown v. Barkham*. The *Attorney General v. The Brewers' Company* does not apply to the present case. The Lord Chancellor there thought the 180*l.* such a debt as ought to carry interest.

Lord Commissioner Eyre.—In that case it was held, that the debt did not carry interest till it was ascertained by the Master's report; but, from the time it was so ascertained, it ought to carry interest. That case is in point to the present, except as to the circumstance of that being upon a hearing and decree, and this upon petition. I believe the course is, that after a report where money is to be raised by sale or mortgage, a reasonable time is allowed for raising it, and if it is

(2) Lord Loughborough C., at first, thought *Bickham v. Cross* a singular case; but said afterwards that "Lord Hardwicke was perfectly right, and did not vary from his general reasoning." Vide 2 Ves. jun. 160. 164. 166. See further the Editor's observations upon it from Reg. Lib. Supplement to Ves. sen. 388, 389.

raised

1792.

Cause  
against  
Lowth.

[ \*159 ]

[ \*160 ]

1792.

CROSS  
against  
LOWTH.

raised in a reasonable time, no interest is allowed; but if there is a further delay, the creditors are kept out of money of which they could make interest; and where the delay is apparent, I see no reason why the estate should be delivered from paying the interest.

Here the lady is entitled to interest, the provision being for her maintenance. There might be a specious appearance of justice in distinguishing her case from that of the annuitants; but a debt is a debt, and we are not warranted to make a distinction.

If there is a difference between the order being upon a decree, or upon a petition, the cause must be set down for further directions, but in *Bickham v. Cross* it was done upon petition.

The other Lords Commissioners concurring, the order was made as prayed. †

† This question came on before the Lord Chancellor, on a petition, 16th of March following, when he ordered it to stand over, in order to consider it, and afterwards, 8th of June, discharged the order. *Vide postea*, 316.

[\*161]

Lincoln's Inn  
Hall, 10th, 22d  
December.

Lords Com-  
missioners  
Eyre, Ashurst,  
and Wilson.

A trustee, purchasing a leasehold farm, devised to him for the use of the plaintiff, at an appraisement, afterwards renewing the lease in his own name; and purchasing part of the testator's stock; declared to be trustee, and to be accountable for the same to the plaintiff. (1)

[\*] KILLICK against FLEENEY.

(Reg. Lib. 1792. A. fol. 162.)

**JOHN SHEPHERD** being seised of real estate, and possessed of a leasehold farm, called the manor of *Billingham*, situate at *South-End*, in the parish of *Lewisham*, Com. *Kent*, which he had by lease, for a long term of years, of Lady Viscountess *Falkland*, under a small annual rent, and which leasehold estate was of great value; and being also possessed of money in the public funds, and other personal estate, made his will, bearing date 6th of *September*, 1777, whereby he gave and devised to the defendant, his nephew, *John Fleene*, all those his several messuages, lands, tenements, and hereditaments, situate at *Deptford*, in trust to and for his son (the plaintiff) *John Shepherd Killick*, his heirs and assigns; but if his said son should happen to die before his age of twenty-one, then his will was, that his said estate should descend to his heirs at law. And he gave to his said nephew *John Fleene*, all his goods, chattels, and personal estate of what nature or kind soever, upon trust nevertheless, and to and for the benefit and advantage of his said son *John*, until he should arrive at his age of twenty-one. He then made a provision for the plaintiff's maintenance, and ordered that, when of age, the defendant should account with him for the produce of his real and personal estate, and deliver up possession of the same to him; and gave the same over, in case the plaintiff should die under twenty-one years of age, and appointed the defendant sole executor of his said will. By a codicil to the said will, dated the 26th of the said month of *September*, "he gave to the said *John Fleene* (the defendant) his executor and trustee named in his said will, "all his right, title, and interest in and to a carr-room, to hold to his "said nephew, his heirs, &c. to and for his and their use and benefit,

(1) See the doctrine in these instances stated in *For v. Mackreth*, *antea*, 2 vol. 400. &c. and the Editor's note, *ibid.*, *Cross v. Ballard*, *antea*, 3 vol. 117., *Whelpdale v. Cookson*, Supplement to Vesey, senior, pp. 8, 11, 12. &c. &c. As to parties being held trustees of renewed interests in leasehold premises, &c. where their situation had given them facilities of acquiring those advantages, see in *Pickering v. Fowler*, *antea*, 1 vol. 197. and the Editor's notes.

"as some token of his (testator's) regard for him, and of the confidence he (testator) placed in him, in appointing him executor in his said will, upon the trusts therein mentioned, and hoping he would undertake and faithfully execute the same."

The testator died the 21st of *October*, 1777, leaving plaintiff his only son and residuary legatee, an infant of the age of about [\*] eight years; and, soon after his decease, the defendant proved the will, and took possession of the real and personal estate of the testator.

Some time after the death of the testator, the defendant had the farm appraised by two appraisers, who valued the same, and the stock thereon, at the sum of 1745*l.* 18*s.*, and had the household goods, &c. appraised by other persons, who valued the same at 89*l.* 2*s.*, amounting, in the whole, to the sum of 1835*l.* 2*s.*, at which price the defendant took the same himself, and he afterwards sold part of said leasehold estate, and obtained a promise of a renewal of the lease from *Francis Motley Austen Esq.* the landlord of the said leasehold estate.

The plaintiff, by his bill, impeached this sale as at an under price, fraudulent, and a gross breach of the defendant's trust under the will of the testator, and prayed an account, and that the defendant might be declared a trustee for him, as to the leasehold estate, and be directed to deliver the same up to him, with all title deeds, muniments, &c. in his custody.

Lord Commissioner *Eyre*.—The defendant has conducted himself grossly in selling out of the funds; but if I am pressed to declare him a trustee for the plaintiff, of the lease and renewed lease, and tenant at will of the farm, I must pause a little.

The defendant, as executor, not only had a right to sell the stock upon the farm, and assign the farm, and discontinue the cultivation of it on the account of the infant, *but it was his duty so to do*; he has sold it to himself, and charged his own price, but shall he therefore be a trustee for the infant, for whom he could not, without a breach of trust, have held it; or shall he not rather be bound by the sale, and account for the true value to be settled by the Master? (2)

Lord Commissioner *Wilson*.—The defendant, as executor, was not compellable to carry on the farm for the infant for [\*] thirteen years; but having carried it on, he cannot now say that he did not carry it on as trustee. (3)

At another day, Lord Commissioner *Eyre* declared, that he was now satisfied, upon looking into the cases, that the defendant was to be considered as a trustee for the infant: and it was decreed accordingly. (4)

(2) In these cases the parties interested *have an option either* to take back the property, or make the person guilty of the fraud account for its full value. See in *Whitdale v. Cookson*, Supplement to Ves. 8. 11., 6 Ves. 627., 8 Ves. 353., and the other references in note (1), *ante*.

(3) A person who, knowing of his appointment as a trustee or executor, interferes with the property or subject-matter cannot repudiate the trust, and say he acted as factor or agent. See *Conyngnam v. Conyngnam*, 1 Ves. 522. and Supplement to Vesey, 221. &c.

(4) Some special enquiries were directed, and the defendant was ordered to pay the plaintiff the costs of the suit up to that time. R. L. — The Editor thinks it may be acceptable to subjoin a report of the principal case from the MS. notes of Mr. Cox, in Lord *Colchester's* collection. It is as follows:

KILLICK v. FLEENEY. In Chancery, December 10. 1792.

Infant entitled under a will to the residue of personal estate. Executor in the schedule to his answer charges himself with 1835*l.* as the purchase-money of a leasehold farm, and the stock upon it, which he had carried on ever since the testator's death (about ten years) upon his own account. The bill sought to charge him with compound interest for this money, and with the costs of the suit.

Notwithstanding he admitted himself to be a debtor to the estate in the amount of the sum of 1835*l.* yet he told out 1500*l.* 3 per cent. Bank annuities, part of the testator's estate,

1792.

KILLICK  
against  
FLEENEY.

[ \*162 ]

[ \*163 ]

Trustee.  
How far  
charged with  
interest and  
costs, and  
profits of a farm  
carried on by  
aid of testator's  
personal estate.



1792.

KILICK  
against  
FLEENEY.

estate, for the purpose of paying debts, and he paid the maintenance of the infant out of this principal fund.

At the hearing he offered to pay interest on the balance, at the rate of 4 per cent.

*Solicitor General.* — The rule is, that where a trustee deals with funds for his own benefit, it shall be in the choice of the *cestui que trust* to have the fund replaced, or to have the profits which the trustee has made of it; it may be argued that it answers every purpose the *cestui que trust* has a right to look to, that the fund should be replaced; but the Court, for the sake of preventing such transactions when very probably the trustee may be unable to do that justice by replacing the fund, has said, "We will take away" all temptation from a trustee to do that, by laying it down as a general rule that by "no possibility shall the trustee have any advantage from it."

Lord Commissioner Eyre. — His conduct is very gross in selling the stock; for this there is no colour.

If pressed upon us we must hold that the executor is to be considered as trustee for the live stock and profits. It was his duty to sell the farm. There is no direction in the will to carry it on for the benefit of the infant, and it would have been misbehaviour in him to have done this without the sanction of the Court. It depends upon personal skill, and too perilous for a trustee to do without the directions of a court. The only way in which an objection can be taken is the attempt to bind the infant by the particular sum which the executor has thought fit to charge himself as the value of the farm, stock, &c. At any rate, however, the executor was considerably in cash, yet though this was amply sufficient to pay all debts and legacies, and the maintenance of the infant, yet he has sold the 3 per cents. which were producing interest, and out of which interest the maintenance ought to have been paid, instead of the principal.

Therefore, I think he must replace the stock, and be charged with interest; and in respect of the misconduct, I have before mentioned he ought to be charged with the costs. If you insist upon making him trustee for the profits of the farm, I wish to take further time.

*Solicitor General* mentioned the case of *Barker v. Hatford*, where the executor was charged with the profits of a brewery which he had carried on for his own benefit.

He also mentioned the case of *Thoyts v. Thoyts*, where a coal-factor's trade was made subject to the demand of *cestui que trust*. (5)

(5) The matter stood over for judgment until the 22d; when it came on, Lord Chief Baron Eyre decreed *ut supra*, p. 163. and note (4).

Lincoln's Inn  
Hall, 15th Jan.

Lords Com-  
missioners  
Eyre, Ashhurst,  
and Wilson.

Where a bill  
has been filed,  
[and decree  
made] for an  
account, and a  
creditor comes  
in before the  
Master, but  
afterwards  
brings an  
action, the  
Court will  
enjoin. (1)

But where  
the defendant  
has not applied  
in the first in-  
stance, it shall  
be without  
costs.

### HARDCASTLE against CHETTEL.

(Reg. Lib. 1792. A. fol. 55.)

**M**OTION for an injunction to restrain *Mary Forrest*, widow, administratrix of *Thomas Forrest*, deceased, from entering up judgment, and from all further proceedings in an action commenced by her against the defendant, in the Court of King's Bench, and that she might be directed to pay the costs of the action, and of the application to the Court.

The bill was filed by the plaintiffs, on behalf of themselves and others the creditors of *Chettle*, against his administratrix for an account, &c.

In *February*, 1790, the usual decree was pronounced for taking an account, and for creditors to come in before the Master.

In *Easter* and *Trinity* terms following, the usual advertisements for creditors to come in were inserted.

On the 13th of *July*, 1790, *Mary Forrest*, as administratrix of *Thomas Forrest*, caused an affidavit to be brought in before the Master, stating

(1) See *Brooks v. Reynolds*, *antea*, 1 vol. 183., with the Editor's note. — The Editor thinks it may be serviceable to repeat here, that Lord Eldon C. introduced the salutary caution which now prevails, that the executors, &c. making the application, shall state, upon oath, the amount of the assets. *Vide* the above reference, *Paxton v. Douglas*, 8 Ves. 520. *Gilpin v. Lady Southampton*, 18 Ves. 469. &c. After a decree to account, an injunction will be granted against a plaintiff, on the application of a defendant, to restrain proceedings at law, in an action brought pending the suit in equity. *Wilson v. Wetherherd*, 2 Mer-  
vale, 406. In addition to the above references on the principal point, see *Goate v. Fryer*, and *Wright v. Draine*, *antea*, 23. 87. and the notes.

*Chetile* to have been indebted at the time of his death to *Forrest*, in the sum of 148*l.* 18*s.* 6*d.* upon a bill of exchange, bearing date the 12th of September, 1789, drawn by *Forrest* on *Chetile*, and accepted by him.

Doubts being entertained respecting the consideration of the bill, the solicitor for the defendant wrote a letter to *Mary* [\*] *Forrest*, purporting that *Mrs. Chetile* meant to contest the same before the Master. Notwithstanding this letter, *Mary Forrest* did not take any step to establish her debt before the Master; but on the 31st of January, 1792, brought an action in the Court of *King's Bench* against the defendant, upon the said bill of exchange, to which action the defendant pleaded the general issue and *plene administravit*. (2)

The action came on to be tried at the sittings after *Michaelmas* term, when a verdict was given for *Mary Forrest*, for the amount of the bill of exchange and interest.

*Mr. Solicitor General* and *Mr. Cooke* argued, that the creditor in this instance ought to be restrained from further proceeding at law, the whole fund being under the administration of the Court; that *Mrs. Forrest* not being able to establish her debt before the Master, had resorted to an action, where the bill alone was evidence without any proof of the consideration, and that such proceeding was unjust and vexatious.

*Mr. Attorney General* and *Mr. Johnson*, attempted to justify the proceedings, by insisting that the bill against *Mrs. Chetile* wanted parties, as it did not include a person to whom the defendant had confessed a fraudulent judgment, and that *Mrs. Forrest* by coming under the decree, could not obtain a right to add parties, or investigate the propriety of that judgment.

Lord Commissioner *Eyre* said, that might be a reason for filing another bill, but not for bringing an action; that he thought the creditor having applied before the Master to prove the debt, was so far become a party to the suit, as to warrant this motion; that if the creditor had not come in before the Master to prove, a new bill must have been filed. (3)

He had no doubt that an injunction ought to be granted: but he doubted as to the costs.

Upon which the *Solicitor General* said, that as the defendants had not applied for the injunction in the first instance, he should not press the costs.

Injunction granted, without costs.

(2) She had also been served with a notice, that she would be required to prove, at the trial, the consideration actually paid or given for the bill of exchange; but she did not do so. R. L.

(3) The practice is now contrary, and the injunction always granted in the original suit. See the Editor's note to *Brooks v. Reynolds*, *antea*, 1 vol. 183.

1792.

HARDCASTLE  
against  
CHETILE.  
[ \*164 ]

[\*165]

[\*] HILARY TERM,

33 Geo. 3. 1793.

[Vide S. C.  
2 Ves. jun. 42.]  
23d, 24th Jan.

Lords Com-  
missioners  
*Eyre, Ashhurst,*  
and *Wilson.*

### ATTORNEY GENERAL *against* The FOUNDLING HOSPITAL.

[Where visitors  
are appointed  
the Court  
never interferes  
with their dis-  
cretion in the  
management  
except in cases  
of gross  
abuse, &c. (1)]  
An injunction  
[therefore] re-  
fused, to re-  
strain the  
governors of  
the Foundling  
Hospital from  
building on the  
charity estates.

**MR. ATTORNEY GENERAL**, supported by *Mr. Solicitor General*, *Mr. Mitford*, and *Mr. Richards*, moved for an injunction to restrain the *Foundling Hospital* from entering into contracts for building, &c. on *Cold Bath Fields*.

They stated that the *Foundling Hospital* had been established by letters patent, confirmed by act of parliament (13 Geo. 2. c. 29.) by the name of the *governors and guardians of the hospital, for the maintenance and education of exposed and deserted young children*, who, as such, were entrusted with very extensive powers, and particularly of purchasing, holding, and of selling lands: that the committee had entered into contracts, and were in treaty for other contracts with builders, for building upon lands belonging to the hospital, and situate on the east, west, and north sides thereof, under ground-rents of near 4000*l.* a-year, and for making bricks; and that it was of great importance to the public, and to the hospital itself, that they should be restrained from entering into such contracts; as the building upon lands adjacent to the hospital might affect the salubrity of its situation, and the health of children educated there. They stated the present income of the hospital to be about 4000*l.* a-year, and the expence of the maintenance, &c. of each child being about 10*l.* it sufficed for the maintenance [\*] of four hundred children, which was as large a number as were proper objects of the charity; so that it was not necessary, on that account, to enter into these contracts; and that it was not certain these contracts would prove beneficial to the hospital, as the contractors (especially in the event of a war) might not be able to fulfil their contracts: that it had been thought necessary, at the time of the foundation of the hospital, that it should be situated in the country, for the benefit of those who were the objects of the charity: that it was well known that in *London*, half the species did not attain two years of age, and that if the health of the children should be affected by the buildings, it would be too late to interfere: that the making bricks in the vicinity was very likely to affect the salubrity of the situation; and that wherever trustees of a charity were doing what was detrimental to the charity, or inconsistent with its proper objects, this Court would enjoin. They stated some instances, in which the committee had deviated from the proper objects of this charity; that they had applied legacies to the annual purposes, instead of investing them as an addition to the principal fund; that they had sold out stock;

[\*166]

(1) The report in *Ves. jun.* is much preferable. Upon the point in question, see *Attorney General v. Middleton*, 2 *Vesey*, 327. and Supplement to *Vesey*, 354., *Attorney General v. Harrow School*, 2 *Ves.* 551., and the cases of *Kirkby Ravensworth Hospital*, 15 *Ves.* 305., and *Attorney General v. Earl of Clarendon*, 17 *Ves.* 491. There was much discussion in a recent case, as to whether the facts amounted to such a visitatorial appointment as excluded the primary interference of a court of equity; but the general principle was admitted *ut supra*, where there was a visitor with full powers. *Vide Attorney General v. Brown*, 1 *Swanston*, 265. to 309.

that

that they had taken parish children into the hospital by contract with parish-officers, which children were by no means the objects originally intended by this charity, which was confined to *exposed and deserted* children: and if they wanted this increased fund, for purposes so inconsistent with the original intention, that was a good reason for the Court's interference. With respect to the jurisdiction, they argued, that wherever trustees of a charity abused the trusts, the Court would enjoin: that there was not a doubt, the committee had acted with the best intentions to benefit the charity: but the Court would prevent any thing being done that might be detrimental, which would appear at the hearing of the cause; therefore it was very reasonable to enjoin till then. They cited, in proof that the Court had such a jurisdiction over charities, 2 Vern. 397., 1 Vesey, 534., 2 Vesey, 505. 551., Duke's Charitable Uses, 69., and said, that in the case of *Sutton Colfield*, the trustees had let part of the charity estates for building, and were enjoined by the Court: and the Court had also interfered with respect to the application of a sum of money which was in this Court, and which the late Archbishop of *Canterbury* intended to lay out in building a palace.

Lord Commissioner *Eyre* (without hearing the other side) said, he had not a doubt that the Court had a jurisdiction over charities, and that where they are founded in charters, or by act of parliament, and a visitor appointed, or where trustees or governors abused their trust, the Court could take notice of such abuse; not in the character of a charity, but as an abuse of a trust: but that where the management of a charity was entrusted to governors or guardians by the charter or act of parliament, such governors had a right to exercise their discretion; and that, as to opinion, although the Court should be of a different one from such governors, it would not set up that opinion against the discretion of the trustees. He referred to the case of *Attorney General v. Middleton*, 2 Vesey, 327., and (the other Lords Commissioners concurring)

Refused the motion.

1793.

ATTORNEY-  
GENERAL  
against-  
The FOUND-  
LING HOSPITAL.

[ \*167 ]

# LOWTHIAN against HASSEL.

(Reg. Lib. 1792. B. fol. 216.)

A BILL brought by creditors for the distribution of the effects of *Andrew Whelpdale*, and a sale of his real estates, which he had settled by his will on his brother *Thomas*, a defendant to the suit.

A decree was made 28th June, 1782, by which the Master was directed to take an account of testator's personal estate not specifically bequeathed, which was to be applied in payment of his debts and funeral expences, in a course of administration.

And it being suggested, that the personal estate would not be sufficient, an account was directed to be taken of the rents and profits of estates directed by the testator to be sold for payment of his debts; and the estates were ordered to be sold, and the money to arise by the sale of said estates, and what should be coming on the account of rents and profits, was to be applied to make good the deficiency of the personal estate; but in case any of the specialty creditors should have exhausted any part of the testator's personal estate, in payment of their debts, they were not to receive any thing out of the money arising from the said sale, and from [\*] the said account of rents and profits, until his other creditors were paid up equal with them. The Master made his report, stating the

different

Lincoln's Inn,  
Hall, 16th Jan.  
Lords Com-  
missioners  
*Eyre*, *Ashhurst*,  
and *Wilson*.

A creditor having five bonds, one of which had been paid before the bill filed; afterwards a decree that the specialty creditors should abate in proportion; he shall not be called upon to bring back what he has received, but shall only abate on the out-standing debt.

[ \*168 ]

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LOWTHIAN  
against  
HASSEL.

different accounts, and what had arisen from rents and profits, and what by sale of the premises.

July 23d, 1789, the cause came on for further directions, when certain sums were ordered to be paid into the Bank, to the account of the real estate, and other sums to the account of the personal estate, and it was ordered, that the Master should enquire and state what sum was produced by the personal estate, what by equitable assets, and what by legal assets, and what specialty debts were owing by the testator by which the heir was bound, and what were his simple contract debts.

The Master made his report, and the case came on again for further directions 23d July, 1790, when several directions were given as to costs "and it appearing that the funds directed to be carried to the account of legal assets, would not appear to be sufficient to pay the specialty debts remaining unsatisfied, Lord Chancellor declared, that the specialty creditors were to abate in proportion, and the Master was to settle in what proportion they were to abate."

The defendant *Garforth* was a specialty creditor of the testator by five bonds — The exact amount of one of these bonds, with the interest due thereon, being 473*l.* 14*s.* 9*d.* had been paid on the 26th April, 1779, previous to the bill filed.

And upon the 30th April, 1792, the Master made his report, and in the second schedule thereto, called "an account of the several sums of money due to the specialty creditors for principal and interest on their respective debts, and the proportion that each creditor is to receive, at 13*s.* 6*d.* in the pound," were the following statements: "the legal assets amount to 4207*l.* 1*s.* 8*d.*, out of which is to be paid without any abatement, 1683*l.* 19*s.* 11*d.* which leaves to be divided amongst the specialty creditors, in the proportion there named, the sum of 2523*l.* 1*s.* 9*d.* To *John Baynes Garforth* on five bonds 2676*l.* 11*s.* 1*d.* the dividends thereon amount to 1806*l.* 13*s.* 3*d.* but the said defendant *Garforth* having received on the 26th April, 1779, the sum of 473*l.* 14*s.* 9*d.* which with interest computed thereon [\*] to the 28th April, 1792, (the time that the interest on the five bonds is calculated to) makes the sum of 781*l.* 7*s.* 6*d.* which is to be deducted from the said 1806*l.* 13*s.* 3*d.* to put him upon a par with the rest of the creditors, and leaves due to him 1025*l.* 5*s.* 9*d.*

[ \*169 ]

To this report, the defendant *Garforth* took an exception, that under the decree, the Master ought not to have made any deduction in respect to the sums paid to the defendant in part discharge of the debts due to him by specialty: but that the defendant ought to have been suffered to come in upon the legal assets *pari passu*, with the other specialty creditors, for the whole of what remained due to him by specialty.

Mr. *Miford* and Mr. *Graham* (in support of the exception) said, that the common rule with respect to equitable assets is, that if some creditors have taken part of the personal estate, they shall not be paid more till the other creditors shall have been paid as much as they have; but this rule is never extended to legal assets; and all that has been paid before the bill filed must be considered as paid out of the legal assets. The arrangement here is, that no creditor shall receive more, till the others have received as much as he has, but the payment shall be *pari passu*; but this is only of subsequent assets, and not applicable to those paid before the bill. By a case of *Basset v. Leach*, 22d February, 1752, it appears, that if creditors have been paid part of their debts out of personal estates before the bill filed, and come before the Master to prove the remainder, they shall not be stopped till other creditors shall have received an equal proportion. If any one creditor has got an advantage in the distribution of legal assets, the Court will allow him to hold

hold it. In *Martin v. Martin*, 1 Vesey, 211, this doctrine is laid down. Where a suit is brought at law by one creditor, the Court will never interfere by injunction, until there is a decree, *Brooks v. Reynolds*, (*ante*, vol. i. p. 183.) and then, the Court has determined on the object. But if Mr. *Garforth* is called on to bring forth what he has received, it would be the same thing as stopping him by an injunction before a decree. Where the creditors cannot get at the assets without the interference of this Court, then it will make the party do strict justice; but it is perfectly different as to legal assets, and if the Court does [\*] not lay its hand upon this sum in the hands of Mr. *Garforth*, he has a right, at law, to retain it.

Mr. *Attorney General* and Mr. *Alexander*, in support of the Master's report.

The Master has done right. The general principle is clearly this, whether the application of it is right or wrong, that legal assets shall be administered in this Court as they would at law; but equitable assets shall be divided equally among creditors. Here the Court found the legal assets deficient for the payment of debts, and therefore ordered the estate to be sold. Suppose Mr. *Garforth* had been proceeding upon legal assets, he might have been prevented from proceeding, till he had brought in what he had already received. Mr. *Garforth* is not to be considered as fully paid on one bond; but only as partly paid on his whole debt. It is only the case of a creditor on several securities, paid the sum which is the amount of one of those securities. It cannot be assimilated to the case of an injunction stopping a creditor going on regularly to recover his debt at law. In a bill, *Garforth* could not have relief, without bringing this sum to account; if he sought equity he must do equity. There are a thousand instances where, though a party cannot be deprived of an advantage he has acquired at law, he must, if he comes into a court of equity, do equity. As in the case of usury, he must pay the money which is really due, though, at law, he might have got rid of the contract. As to this particular case, when it first came on for further directions, the Court was not aware of what had happened: but by the direction that specialty creditors should abate in proportion, it could only mean they should bring what they had received into hotchpot.

Lord Commissioner *Eyre*. I am perfectly satisfied that the exception ought to be allowed.

It depends on the sense of the words *pari passu* and "to abate in proportion." If a sense so large is to be admitted, as is contended for by those who argue that the exception should be disallowed, it must be the same as in administering equitable assets.

[\*] I do not see any great injustice in letting a creditor get advantage by diligence.

The Court proceeds on equitable assets by the rule of equality, but on legal assets it goes only a certain way; and, until a deficiency appears, it must administer them according to the rule of law. There is no case where, if a creditor has obtained an advantage before the bill filed, that he has been obliged to refund; or where, in such a case, he has been partly paid, that he has been called upon to bring back what he has received, into hotchpot. It would deprive him of an advantage which he has fairly obtained, and, at law, has a right to hold.

The rule as to simple contract creditors standing in the place of specialty creditors, for what they have exhausted of a fund belonging to the simple contract creditors, is a rule of equity; but it does not disturb the legal assets. It is consistent with the rule of law, that, when the specialty creditor has taken the personal estate, the simple contract creditor shall take the real; and this does not disturb the right

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against  
HASSEL.

[\*170]

[\*171]

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against  
HARRIS.

of the specialty creditor, because he had a right to go against the real estate.

If the doctrine of taking, *pari passu*, will not prevent the creditor who has taken his remedy at law from retaining it, a decree afterwards will not disturb it.

Lord Commissioner *Ashhurst*. When an order has been made, the Master cannot vary it.

The order, here, was made before it was known that there was a deficiency. The order is, that the Master shall enquire into the outstanding debts, and the creditors to abate in proportion. That is a reason why the exception should be allowed.

Here one bond had been paid: that should be given up. The Court will not disturb that payment, the Court can only act upon the remaining debts.

[ \*172 ]

[\*] Lord Commissioner *Wilson*. In administering legal assets, the Court follows the law; but where there is a deficiency, it administers them *pari passu*. Then the question is, Whether, in case of a deficiency, and a decree for payment of debts, if a creditor has been paid, he shall refund? That has been considered, here, as being the rule, but it is not. The Master has done it, on the idea that it was within the order, on a mistake. This construction would take from the creditor the advantage he had obtained at law. The Court will not take from him the legal remedy which he had at the death of his debtor.

Exception allowed.

## HILARY TERM.

32 Geo. 3. 1793.

[Vide S. C.  
2 Ves. jun. 51.]  
28th Nov. 1792.  
25th Jan. 1793.

In Court.

Lords Com-  
missioners  
*Ashhurst* and  
*Wilson*.

## WATSON against BIRCH.

(Reg. Lib. 1792. B. fol. 113. b.)

After a sale in this Court, and the Master's report of the purchaser confirmed, the bidding shall not be opened but on special circumstances (1); mere increase of price, is not sufficient for this purpose. In the present case, however, that, together with the person principally interested being a prisoner for debt at the time of sale, [and stating that he did not, under such circumstances, know the practice of the Court as to coming in before the confirmation of the report,] was held sufficient.

Mr. *Mansfield*, supported by Mr. *Selwyn* and Mr. *Nedham*, moved, on behalf of General *Birch*, the defendant in this cause, and of John *Norman* and others, that John *Clements* Esq. who, by the report of Master *Spranger*, is allowed to be the purchaser of the premises mentioned in the report, at the sum of 15,300*l.* might be discharged from the purchase, and that it might be referred back to the Master, to approve of a better purchaser for the premises, the said John *Norman* and others offering to give 19,300*l.* for the same, upon payment of full costs to the former purchaser.

There had been a previous sale of the premises, upon which they had been purchased by *Nathan Hyde* Esq. On the 6th of June last

(1) This decision was strongly disapproved of by Lord *Eldon* C. See in *Morice v. Bishop of Durham*, 1 Ves. 57., and *White v. Wilson*, 14 Ves. 151, 152. &c. See also the Editor's notes to *Prideaux v. Prideaux*, ante, 1 vol. 287., and *Scott v. Nesbit*, 3 vol. 475.

there

there had been an order for a re-sale of the premises; and, on the 29th of the same month, the Master reported *John Clement Esq.* the best purchaser, at 15,300*l.* On the 15th of *July* there was an order to confirm the Master's report *nisi*; and, on the 24th of the same month, the report was confirmed absolutely.

The present application was founded on the affidavit of the person offering the further sum of 4000*l.*; and of General *Birch*, of having employed agents to bid a higher price than had [\*] been bid at the re-sale of the premises, who had deceived him; and that, from the state of his circumstances, being a prisoner for debt, he could not apply to his friends to bid a larger sum; and he swore that he believed the premises to be worth 10,000*l.* more than the sum at which they had been sold at such re-sale.

In support of their motion, the counsel for General *Birch*, and the other persons applying to the Court, admitted, that after the report of a purchase had been confirmed, it was not of course to open the biddings, though it was so where the report had not been confirmed. That there were only two cases in which the doctrine was laid down, that, after confirmation of the report, the bidding should not be opened. The first, *Prideaux v. Prideaux* (*ante*, vol. i. p. 287.) where they were ordered to be opened by the Lords Commissioners, and that order afterwards discharged by Lord *Thurlow*; the other of *Scott v. Nesbit* (*ante*, vol. iii. p. 475.); that the latter was a very short note. That in this latter case the Lord Chancellor had opened the bidding on one lot, though it was the case of a re-sale, but where the report had not been confirmed; but had refused to do so on a lot where the report had been confirmed. But there had been several cases where the bidding had been opened, notwithstanding the report had been confirmed, and merely on the circumstance of considerable advance of price being offered; that this was the case in *Price v. Moxton*, 12th of *June*, 1754, where Mr. *Brograve* had been reported the best purchaser, at 44,500*l.* and the report had been confirmed; but, upon an offer of Lord *Hertford* to advance 4500*l.* the bidding was opened, and 2000*l.* ordered to be deposited. That in *Hooper v. Jewel*, where a sale of an estate had been made for 2500*l.* and the purchaser reported, and that report confirmed, it was opened on an advance of 150*l.* That in *Gower v. Gower* (2), before Lord *Northington* Chancellor, 19th of *February*, 1765, Mr. *Ryder* had purchased the estate at 25,800*l.*: by the Master's report, 23 of *April*, 1765, he was allowed the best purchaser, and, upon order, paid 1500*l.* into the bank, and the Master's report was confirmed absolutely; but upon the application of Mr. *Beaumont* offering to give 2000*l.* more, and to repay Mr. *Ryder* his 1500*l.* and interest, it was ordered, that, upon payment to Mr. *Ryder* of that sum, and all his costs, Mr. *Ryder* should be discharged from his purchase, and it was ordered that the estates should [\*] be resold. In another case of *Gwynne v. Howe*, 14th of *November*, 1766, *Richard Heron Esq.* had been reported the best purchaser of the estate in question, at 32,100*l.* *John Windsor Esq.* offering to give 1000*l.* the bidding was opened.

In the present case, the sum offered is larger in proportion than in any of these cases, and the persons offering are ready to make any deposit the Court shall think fit; and the other circumstances are stronger in the present than in any of the former cases. The estates are sold for the payment of debts, which cannot be paid unless they are re-sold. There is not a doubt but they will sell for a much higher price, which advantage the creditors will lose; at least they will lose 4000*l.* now offered; and the remainder-man was in distressed circumstances, and in

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against  
BIRCH.

[\*179]

[\*174]



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prison for debt, and was deceived by agents who had promised to open the bidding: under such circumstances, nothing less than a decision of the House of Lords, that biddings shall not be opened after the report confirmed, ought to stand in the way.

Mr. *Solicitor General* and Mr. *Mitford* opposed the motion.

This application stands only on the ground that it will be for the benefit of the persons interested in this estate that the biddings should be opened; but it is for the general interest that persons should know at what time purchases made in this court are concluded, and the particular interest of parties ought not to prevail against their general interest. It does not appear either in what degree any creditor's interest will be affected by the fate of this motion, or whether the creditors will be injured or not by its being refused.

This is a second sale, though not the second in the Master's office: there were one hundred and fifty biddings upon it, which shews it was a sale of competition. General *Birch* had, in the first instance, offered the estate to Mr. *Hyde* at 10,000*l*. The order for the re-sale was made on the 6th of *June* last, and on the 29th the purchase was reported: the 5th of *July*, the order was made to confirm the report; and on the 24th, it was confirmed absolutely: from that time, till the 5th of the present month, there has been no application.

[\*175]

[\*] It is now a settled rule, that the Court will not open the bidding where the report has been confirmed, on a mere advance of price.

What is the evidence of its being worth a much larger sum. There is only the offer of 4000*l*. and an affidavit of General *Birch*, the owner of the estate, that he considers it worth 30,000*l*. But no creditor applies. But even if the estate were worth 25,000*l*. the Court will not open the bidding, if there is no fraud in the sale.

*Scott v. Nesbit* (ante, 3 vol. 475.), being the last determination, the Court will conceive that the attention of the Lord *Chancellor* was called to the cases. There the advance offered was one-seventh of the whole price, and the Lord *Chancellor* did state the effect of fraud; but the Lord *Chancellor* saw that it was proper purchasers should have notice, that, after the report was confirmed, their purchases should become fixed. *Prideaux v. Prideaux*, was a strong case on the rule, the inadequacy of price was immense. (3) There, *Gower v. Gower* (4) was cited, and the order made by Lord *Thurlow* was never reversed. *Gower v. Gower* had very strong circumstances in it that are not mentioned in the report of it; the ground upon which it went was, that a survey had been made by some collusion with the tenants; that many of the purchasers were connected together, and some of them knew of the fraud.

In *Price v. Moxon* there were some circumstances of a similar kind: there was some particular knowledge of the real value, upon which the sale was set aside.

The particulars of *Hooper v. Jewel* do not appear. Its authority is done away by *Prideaux v. Prideaux* (3), and *Scott v. Nesbit*, which have fixed the rule that, after the purchase is confirmed, the bidding shall not be opened.

In the present case, there is no pretence of fraud. The conversation of *Rawlinson* and *Wild* (General *Birch*'s agents) only shew they were concerned they had not bid more for the estate; there is no imputation whatever on Mr. *Clements*.

(5) The decision in *Prideaux v. Prideaux* was clearly wrong. See the Editor's note upon it, ante, 1 vol. 287.

(4) *Gower v. Gower* is reported from Lord *Northington*'s MSS. 2 Eden, Ca. Ch. 348; and on the appeal in Dom. Proc. 6 Bro. P. C. 306. octavo edit.

Mr. Mans-

[\*] Mr. Mansfield, in reply: This motion is made on behalf of creditors. With respect to the cases, they do not say that the bidding never shall be opened after the report confirmed, but on the ground of fraud. In *Gower v. Gower*, it was stated by the appellants that there was no fraud. The reasons given by Mr. Yorke and Mr. De Grey, are, that the order was consistent with the practice of the Court on an advance of price, and that these applications are appeals to the discretion of the Court; the survey was only a mean by which the estate might be sold for an inadequate price. It is not laid down any where that inadequacy of price is not a sufficient ground for a resale, it is different as to the degree of inadequacy required. In *Scott v. Nesbit* it is only stated that one-seventh of the value was offered. In *Prideaux v. Prideaux*, the great length of time which had elapsed, was the principal ground against opening the bidding. In Lord Gower's case, the case of Lord Falmouth's estate was mentioned as one where the bidding was opened, merely on the ground of inadequacy. There is nothing, on the part of Mr. Clements in this case, to shew that the estate is not worth 10,000*l.* more than he has given for it; and the circumstances shew it is a hard bargain on the part of the seller, founded on a mistake in General Birch, and fraud in the agents. As to General Birch knowing of the purchase on the 19th, and its not being confirmed till the 24th, what was he to do in four days? Could he find a person in that time to bid more? The transaction must be with persons at Manchester, and he was at the time a prisoner in the Fleet. He had a confidence that the agents would open the bidding. Therefore, he is in the situation of a person surprised.

This day (25th of January) Lord Commissioner Ashhurst gave judgment, to the following effect.

We took time to consider of this matter, because, on the one hand, it is proper that the purchaser of an estate in this Court should know when he is certain of his purchase; and on the other hand, the principal consideration is the benefit of the estate. It is therefore necessary some line should be drawn as to the time within which biddings should be opened.

[\*] Upon consideration, there seems to be no better line to be drawn than this, that the biddings shall not be opened after the report confirmed, except on particular circumstances, which must be in the discretion of the Court. (5)

In *Gower v. Gower*, the principle was laid down. The bidding there was not opened on the circumstance of increase of price offered, alone; he same was the case in *Prideaux v. Prideaux*. (6)

Still, a great increase of price offered will always be a leading circumstance with the Court, to induce them to open the bidding.

Here, it is larger than in any of the cases cited; nearly one-fourth of the whole price.

With respect to the time of the application, it does not bear any great weight. The report was confirmed at the last seal, the application to open the bidding was immediately after the vacation.

The conduct of the purchaser in this case, affords no ground for proceeding.

This reduces it to the situation of the defendant. At the time of the sale, he was a prisoner in the Fleet for debt.

Even in courts of law, which are stricter in their rules than this Court, if a party comes to set aside a judgment, he must come in, in the first

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[\*177]

(5) But see the Editor's notes on *Prideaux v. Prideaux*, *antea*, 1 vol. 287., 11 Ves. 57., and 14 Ves. 151, 152.

(6) That decision was clearly wrong. See the Editor's notes upon it, *antea*, 1 vol. 287.

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WATSON  
against  
BUTCH.

instance; but if he is a prisoner at the time of the judgment, that is always of weight.

If the defendant had been at large, he might have gone down and apprised himself of the value of the estate. He might have got persons who would have offered higher sums; he would not have been obliged to trust agents: this we think a sufficient ground to take it out of the general rule.

[\*178]

[\*] But to shew that we mean to keep to the general rule as much as possible, it must be opened on a deposit of the whole sum. (7)

Mr. *Solicitor General* suggesting that the former purchaser must have all his costs, and the difference of interest of his money,

Lord Commissioner *Ashhurst* said he had not mentioned those, as he considered them as the common terms.

Motion granted.

(7) The order was made on the terms that the parties should pay 4000*l.* into Court as a deposit, within a fortnight, and should pay the former purchaser all the costs, charges, and expences he had paid or been put to by reason of his having bid for and been confirmed the best purchaser of the premises, to be taxed and settled by the Master; and should likewise pay interest upon the monies he had deposited and paid, at the rate of 4 per cent. R. L.

[*Vide* S. C. at the hearing, *antea*, 105 to 115.]

January 28.  
Lords Commissioners  
*Eyre, Ashhurst,*  
and *Wilson*.

Where an heir at law is brought, by order, before the Court, though there is no resulting trust in his favour, he shall have his costs.

ATTORNEY GENERAL against The HABERDASHERS' COMPANY and TONNA. [21st January, 1793.]

(Reg. Lib. 1792. A. fol. 149. b.)

A PETITION of the defendant *Tonna*, that he might be paid the costs of having made out his title. (1)

Mr. *Graham* and Mr. *Cox*, in support of the petition, cited two cases. *Whistler v. Rawlinson* and others. — The plaintiffs claimed to be entitled, as next of kin, to leasehold estates of the testator, *John Rawlinson*, in equal shares; and by the decree 21st July, 1783, it was declared, that the leasehold estates of the testator belonged to the next of kin of *Eleanor Joye*, living at the death of *Christopher Rawlinson*, the tenant for life under the will, and it was ordered to be referred to the Master to enquire who were the next of kin. On the 22d June, 1785, the Master made his report, and certified that the plaintiffs were such next of kin, and disallowed the claims of other claimants, as being in a more remote degree of kindred. And upon the cause coming on for further directions, 5th August, 1785, it was referred to the Master to tax the defendants their costs of suit, and in taxing such costs, it was ordered, that he should tax the costs of persons who came in under the decree, to prove their kindred, and where unsuccessful: and the plaintiffs consenting to pay such [\*] costs, when taxed, it was ordered that the plaintiffs should pay the same accordingly.

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Upon this case, it was observed, that the consent of the plaintiffs went to the payment of costs generally, and not to the costs of these defendants in particular, and that the case of the defendant, *Tonna*, was stronger, because the Master had made a report in favor of his claim.

*Holden* and others v. *Mary Burnell*, and thirteen others — *Pegge v. The said Holden* and fifteen others — Said *Mary Burnell* against *Ellen*

(1) The petition was to vary the minutes in the above respect.

*Burnell*

*Burnell* and eleven others—The question was, Who was the heir or heirs at law of *Darcey Burnell*; the bill therefore prayed, (*int' al.*) that such of the defendants who claimed as heirs at law of the testator might try their respective rights at law, and that proper issues might be directed for that purpose. The causes were heard 7th March, 1781, when the original decree was made, and six issues directed between different parties to try who was, or were, the heir or heirs at law: and the Court reserved the question of costs till after the issues should be tried. The causes came on for further directions, 11th May, 1782, when it appeared that only three of the issues had been tried, but the Court directed the costs of *all* parties, both at law and in this court, as well those who did succeed, as those who were parties to the issues which were not tried, to be paid out of the estate; notwithstanding an opposition against the ordering the costs of those who were parties to the issues which were not tried, and who did not succeed in proving themselves heirs.

It was argued that the case of the defendant *Tonna*, was stronger than either of these, because he had succeeded in making out his claim as heir; and had come in upon the Master's advertisement; and although the Court had declared there was no resulting trust in his favor, it was but reasonable he should be indemnified for the trouble and expence he had sustained by being put to the proof of his claim.

Mr. *Solicitor General*, for the informant, contended, that in *Whistler v. Rawlinson*, the whole depended on the consent of the plaintiffs; he cited *Standen v. Standen*.

[\*] Lord Commissioner *Eyre*. I rather think the consent in that case did not extend to those costs; but whether that was by consent or not, in point of justice, I think we must allow the costs.

Lord Commissioner *Ashhurst*. It would be of bad consequence not to give costs in such a case as this.

Lord Commissioner *Wilson*. It is reasonable it should be done; and unless the practice was clearly otherwise, it ought to be so. (2)

Petition granted.

(2) The order was to vary the minutes, so that the heir at law should be paid the costs, to be taxed as between solicitor and client, which he had been put to previous to the time of his being made a party to the suit in proving himself to be such heir at law. R. L.

1793.  
ATTORNEY  
GENERAL  
against  
The Haber-  
dashers'  
Company,  
and TONNA.

[ \*180 ]

### THE NABOB of ARCOT against THE EAST INDIA COMPANY.

(Reg. Lib. 1792. B. fol. 116. b.)

THE Company's plea having been over-ruled (*Vide ante*, vol. 3. p. 292, &c.) the Company put in an answer, in which they referred to the several charters, letters patent, and acts of parliament, by which they

by a sovereign prince in India, against the *East India Company*, for an account of monies, &c. advanced and paid, in consequence of treaties in the nature of federal conventions, for the protection of their respective territories. (1)

(1) See Mr. Beames's *Elem. Pleas*, p. 73. and the note, and 2 vol. *Harg. Jurid. Argum.* p. 375. The objection in this case arose from the subject being a matter of political discussion; and the decision does not seem to apply to a mere case of property as between a foreign sovereign and any subject or resident in this country, in the usual course of municipal jurisdiction. Lord Loughborough C. seems to have doubted it in *Barclay v. Russell*, 3 Ves. 431.: but the general sentiment of the profession seems in favour of the jurisdiction,

*Vide S. C.*  
2 Ves. jun. 36.,  
and S. C. on  
plea, *ante*,  
3 vol. 292.]  
28th January.  
Lords Com-  
missioners  
*Eyre, Ashhurst,*  
and *Wilson*.  
A bill in this  
court cannot  
be maintained

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*The Natives  
 of Amoy  
 against  
 The East  
 India Com-  
 pany.*  
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they were from time to time invested with the powers, to which, they insisted, they were intitled, viz. the power of sole trading to and from the *East Indies*, &c. to send ships of war, to make war and peace, and to right and recompence themselves for injuries, and to enter into federal conventions with the princes or people that are not Christians, within the limits of their trade, as well on their own behalf as that of the *British* nation, as they should see fit, for the maintenance of their right, and benefit of their trade, and to exercise sovereign power within the limits of their trade. They stated, that in exercising of these liberties they held territorial possessions in the *East Indies*, and maintained a large military force: that the plaintiff is a sovereign prince, within the limits of the defendants' trade, and is not a Christian; and that all the transactions mentioned in the bill, are of a political nature, and matters of state, and done in the exercise of the power of peace and war, and of making federal conventions, and for the military defence of their territories, and of the territories of the plaintiff; and that the instruments mentioned in the bill are treaties and federal engagements of a political nature and matters of state, and therefore [\*] are not subject to any municipal jurisdiction, nor cognisable in this court, or in any court of justice, but only by and according to the law of nations, and therefore they were not bound to answer.

They further stated, the act of the 24th of His present Majesty, constituting the Board of Control, by which it was provided, "that if the said Board should be of opinion that the subject matter of the deliberations of the directors concerning the levying of war or making of peace, or treating or negotiating with any of the native princes or states in *India*, should require secrecy, it should be lawful for the said Board to send secret orders and instructions to the secret committee of the court of directors for the time being, who should thereupon, without disclosing the same, transact their orders and dispatches in the usual form, according to tenor of said orders and instructions of said Board, to the respective governments and presidencies in *India*, and that said governments and presidencies should pay a faithful obedience to such orders and dispatches:" and that since the passing of the said act, such commissioners for the affairs of *India* had been appointed, and they set out who were the then commissioners, and that, inasmuch as the said several transactions in the bill mentioned, and the instruments therein stated to be agreements between the plaintiff and defendants, are of the nature, and relate to the civil or military government, or revenue of the *British* territorial possessions in the *East Indies*, and to the levying war and making of peace, and to the treating and negotiating with a native prince or state in *India*, defendants are no ways able or competent to give any orders or instructions for doing any act relating to the matters in the bill mentioned, but under the superintendence of such commissioners, and inasmuch as said commissioners are empowered to give such orders as they shall think fit, and the court of directors are bound to obey, and the commissioners are empowered to cause secret orders to be sent to the defendants' servants in *India*, without the privity of the defendants, except of the secret committee of their court of directors, which orders the defendants' servants in *India* are bound to obey, and inasmuch as defendants, as they are advised have not the power or ability to obtain the accounts required by the said bill, or

jurisdiction, and some very recent cases, yet unreported, have occurred before the Vice-Chancellor (Sir J. Leach) in which his Honour distinctly held that a foreign sovereign power could both sue and be sued in our courts. In one of them his Honour directed the bill which was exhibited against an agent of the King of Spain to be amended, by praying process against the King of Spain when he should come within the jurisdiction. *De la Torre v. Bernalde*, Nov. 1. 1819. *Ex relatione* Mr. Peppys and the briefs in the cause.

to give any orders for obtaining the information necessary to render such accounts without the concurrence of the commissioners aforesaid, the defendants contended that they ought [\*] not to be drawn into any suit respecting the same, and claimed the same benefit as if they had pleaded the said matters.

To this answer several exceptions were taken on the part of the plaintiff, which being referred to the Master, he reported the answer insufficient in the whole of the exceptions.

The defendants afterwards put in a further answer, in which, after stating that they had been frequently engaged in war, for the protection of the plaintiff's territories, and that he was indebted to them on account of the war with *Hyder Ally*, they set forth at large the instruments dated 2d December, 1781, and 28th June, 1785, and also a *definitive treaty* of friendship and alliance with the Nabob, of the 24th February, 1787, that payments had been made on account of such definitive treaty, but not sufficient to discharge the demands of the defendants upon the plaintiff; they then stated, that an expensive war had broke out against *Tippoo Sultaun*, which was existing when the last advices came away, and that a large debt had become due from the plaintiff to the defendants on account thereof, and that the same might encrease, and insisted, that in case the matters of the bill should be adjudged to be cognizable in this court, and that the defendants should be found to be indebted to the plaintiff, the payment of such debt could not be decreed to the plaintiff, inasmuch as by the law of nations, in case plaintiff should be guilty, or in case defendants should have well-founded suspicions that plaintiff was, or meditated to be guilty of any infraction of the treaties between them, defendants would have a right to withhold from him any sums of money due to the plaintiff, and would have a right of making war upon the plaintiff, and inasmuch as these treaties or instruments were made and entered into under the authority of the act of parliament of the twenty-fourth of the reign of his majesty, and defendants cannot do any thing as to the matters aforesaid, without the order and direction of such commissioners, though they should be directed so to do by this Court; they submitted whether the commissioners are not necessary parties to the suit.

The cause was set down upon the bill and answer.

Mr. Mitford, Mr. Anstruther, Mr. Adam, and Mr. Fonblanque, for the plaintiff.

[\*] The Nabob is in the situation of a suitor in this court, for an account, and that the balance may be paid to him.

If this were a question between individuals, there could be no difficulty, it would be done without regard to whether the party were an alien or a subject: if the plaintiff was not an alien enemy, there would be no objection to him as a suitor in this court.

There is one objection made to the person of the plaintiff in this case, that he is not a Christian: but that objection has been over-ruled these many years.

The Nabob acknowledges, by his bill, that he was a debtor to the Company, and wished to discharge his debt, by permitting the Company to receive his revenues for five years, and upon paying him one-sixth of the revenue, and to carry five-sixths to account. He states that, under this agreement, the Company's servants collected the revenues from 1781 to 1785: that, in the last year, a new agreement was entered in, to let him into possession of his own revenue, and he was to pay a proportion of four lacks for current expences, and twelve lacks in discharge of the debt; and for securing the payment of them, he put the Company into possession of some certain parts of his territories.

In consequence of this agreement, he paid several sums of money on account.

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He charges that the accounts were defective, and claims to be entitled to a just account.

On the face of this bill, it is simply the case of debtor and creditor, and the result of it is the title of the plaintiff to an account.

But it is objected to this, first, that the plaintiff is a person that cannot sue in this court: secondly, that the defendants are persons who cannot be sued: thirdly, that the subject-matter of the suit is not the subject of a municipal jurisdiction; and that, if it was, it involves matters of state not fit for such discussion. Another objection is added, that the defendants [\*] are subject to a controul; that they are not free agents, and therefore the members of the Board of Control ought to be parties to the bill.

The Court has determined on the three first of these objections: it was not possible to over-rule the plea, without considering the plaintiff as a person competent to sue, and the defendants to be sued, and that the subject of the suit was a subject of municipal jurisdiction.

We admit that this determination is not conclusive, because no determination on a plea can ever be conclusive; but the determination is a great and grave authority, because there have been few cases more argued, and in which more pains were taken by the Court.

We admit, however, that the Court is at liberty now to decide otherways.

It was determined that the plea was a plea to the jurisdiction, but, as such, it was singular, because it gave no jurisdiction to any other court, but went to there being no jurisdiction, and to set up a perpetual bar, on the ground that *ex tali facto actio non oritur*.

Considering the point, therefore, as open, we may enter into the whole matter, and contend that this is a case in which the decree prayed ought to be pronounced. And, first, that the plaintiff can sue, and the defendants be sued, as in the case of a simple debt.

The Nabob certainly could sue an *English* subject, to whom he had lent money. Suppose a bond had been given, could not an action be brought upon the bond?

If the subjects of one country take the property of the subjects of another country, it is not the subject of war or reprisal, because other means are pointed out in every country by an application to courts of civil jurisdiction, which must be pursued in all private cases; and, between nation and nation, there is no just war till such application has been unavailable. It is then [\*] only that reprisals, or war between two nations, become justifiable, Grotius, l. 3. cap. 2. s. 4. *locum autem habet, (jus repressaliarum) ut ajunt jurisconsulti, ubi jus denegatur*. Sir Leoline Jenkins's Letter, Wynne's Life of Sir L. J. vol. ii. p. 759. No treatise, antient or modern, treats reprisals as otherwise justifiable than where the first application has been to courts of municipal jurisdiction. Grotius, l. 2. cap. 1. s. 1. & 2. says, *Causa justa belli suscipiendi nulla esse alia potest nisi injuria.—Sic in Romano feciali carmine: ego vos texor, populum illum injustum esse, neque jus persolvere. Ac plane quot actionum forensium sunt fontes, totidem sunt belli: nam ubi judicia deficiunt, incipit bellum*. But till redress cannot be obtained from the ordinary jurisdiction, it is the duty of countries not to go to war. It is the duty of every country to do justice; the consequence is, that if a subject of this country gave to a subject of the Nabob a bond, the suit must be in a court of municipal jurisdiction; then what difference will it make that it is given to the Nabob himself? As the ground that he could not justify war or reprisal, he must apply for justice according to the forms of that country, to the court of which the debtor is amenable. When he entered into the contract, he must consider the party as an *English* subject, amenable to the *English* courts of justice, as there is

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no other means by which justice can be done. The king represents the nation, and the application must be to him to do justice. How can he administer it? By his courts of justice alone. Then this is not degrading to the sovereign power who sues, as it is an application from sovereign to sovereign in his courts of justice. Is there any difference between applying to the courts, and to any other officer; as, for instance, to the Secretary of State? The judges are equally the officers of the sovereign power, and represent it in matters of justice. There is no pretence that the former mode of application is degrading, — why should the latter? The King must himself apply to his courts in matters of justice.

If it is derogatory from the Nabob's dignity to apply to the courts of justice, would it not be more so to apply to the Company who are subjects? If it is contended that they are delegates of the sovereign power, the judges are likewise its representatives.

[\*] If it is derogatory, it is a consequence of his own act: the Nabob, when he entered into the contract, must have considered himself as dealing with *British* subjects.

But it was said that the Nabob himself was not amenable to the jurisdiction, and that was a reason why he should not be a suitor to it. But that is the case with every alien: an alien is not amenable to the jurisdiction. But that has never been considered as an objection to his suing; a foreign ambassador resident here is not amenable; but he may sue.

Then why should he not sue the *East India* Company? At the time of the contract, it must have been under consideration how it was to be enforced. The Nabob must have considered that they were a *British* company, and, as subjects, amenable to the courts of *Great Britain*; and that whilst he could have redress there, he could not justly make war.

The *East India* Company are liable, as subjects, to be sued upon their contracts. There was a case of *Moodalay v. The East India Company* (*ante*, vol. i. p. 469.), upon a cowl or permission to sell tobacco. One of the grounds was, that the act of dispossessing the plaintiffs of their cowl was done as a sovereign power. — Lord *Kenyon* admitted, “that no suit would lie against a sovereign power for an act done in that capacity; but he did not think the *East India* Company within the rule. They have rights as a sovereign power: they have also duties as individuals. If they enter into bonds in *India*, the sums secured may be recovered here. So in this case, as a private company, they have entered into a private contract, to which they must be liable.” They are a corporation for the purpose of carrying on a trade; for which purpose they have certain powers, one of which is to make war or peace; but this is simply a delegated power, which they exercise simply as delegates; but, as a corporation, they are amenable to the ordinary jurisdiction. They pretend to the independence of states, but the distinction between states and corporations is, that, to states, independence is necessary. But the situation of the Company is as different as [\*] can be, — they are perfectly subordinate. Their having the power of making war and peace will not alone constitute them a state. *Grotius*, l. 1. cap. 3. s. 5. par. 2. “*Sed et illud accidere potest, ut in imperio late patente, inferiores potestates belli inchoandi concessam habeant potestatem: quod si fit, jam sane censendum erit bellum geri ex vi summe potestatis; nam quod faciendi quis alii jus dat, ejus ipse auctor censetur.*” This peace or war, therefore, is to be considered as the peace or war of *Great Britain*. They are a corporation first for trade, and responsible to the public for the use made of their powers, and to all other subjects, as far as relates to them. They are not subject to

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the municipal jurisdiction for acts done as the delegates of the crown, unless where the acts are done for profit to themselves; but, wherever that is the case, they are responsible; for it is an established rule, that, where the delegate of the crown takes for the crown, he is not responsible; but where he takes for his own benefit, he is. Where the Company borrow money, they can stipulate in any manner for the payment of the debt; the purpose for which the money was borrowed cannot vary the nature of the act. The sovereign power is not responsible for acts done as such, because it is only the means by which the state acts; but the private acts of sovereign powers are their own, and do not bind the state, Grotius, l. 2. c. 14. s. 2.: where the act of the King means the act of the state; but, in this case, it is not even suggested, that, if the balance be against the Company, the state can be bound; or if it be the other way, that it can be the creditor: the balance could only be demanded of the Company in their private capacity, and in the character of subjects of *Great Britain*; they may be sued here to execution upon their goods. Lord Chancellor (in pronouncing judgment on the plea) put the case of the balance being clearly admitted, and that there was a promise to pay, and put the question, whether an action would not lie. If an action would lie, would not this court take an account, and cause the payment of the balance?

The third objection is, that the subject of the suit is not the subject of municipal jurisdiction, or, if it is, that it is involved with other transactions not proper to be discussed here.

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[\*] They insisted, that matters arising from transactions between independent states, are not the proper subjects of municipal jurisdiction.

Wherever the Company act as the delegates of the state, they are not liable to municipal jurisdiction; but where they enter into private contracts for their own benefit, they are. In the present case, it is simply the case of debtor and creditor, not differing from the case of the bond, or of the acknowledged balance.

As far as they treat for peace or war, they act as the delegates of the state, and are not liable: but where it is for their private property, they alone are responsible. Suppose the Nabob lent money to receive the use of troops; so far as relates to the troops, they would act as delegates of the state; but as to the payment of money, it would be a private transaction: the distinction between the parts of the treaty are perfectly clear. Neither is it true, that considered as states, they cannot sue or be sued. The subordinate states of *Germany* may be sued, *Putter's Germanic Constitution*, by Dornford, 3 vol. 244, their transactions may be rendered subject to courts of judicature, Id. 249., and he gives instances where this has happened, p. 254, &c. and of the means afforded, by which the judgment can be carried into execution. This mode of application has been submitted to by other sovereigns, as in the case of the King of *Norway*, *Ryley's Placita Parliamentaria*, 143. In one case, the king of *Scotland* was the defendant in the suit. In several, the King of *Spain* has sought redress, as to cutting brazil wood, 1 Roll. Abr. 528, &c.: in all which cases, it was thought necessary for the King of *Spain* to apply to the ordinary Courts of justice in this country; and that it would be unjust in him to declare war, till there was a denial of justice. There is no reason, therefore, in this case, why the plaintiff may not sue, and the defendant be sued; or why the subject matter of the suit should not be entered into by the municipal jurisdiction.

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Then as to its involving matters of state. The gentlemen have not shown how the question before the Court, involves matter of state, or how the state can be injured by the suit proceeding. [\*] In all the cases of the king of *Spain*, matters of state might have been involved, as they depended on the right of subjects to cut wood in the *Brazils*. The circumstance

circumstance of the question being between sovereign and sovereign, will not change the jurisdiction. There have been many cases agitated in courts of municipal jurisdiction, where the extent of treaties has been involved. If the subject is not liable to discussion in municipal Courts, it must be from its being in some way prejudicial to the state. But how can it be prejudicial to the state, that the *East India* Company is obliged to perform its contracts? The simple question, in this transaction, is, whether this is the *East India* Company's debt? It cannot affect the territorial dominion, for no execution can go against the territory, only a sequestration of the Company's goods here. How can that prejudice the state of *Great Britain*?

But it may be of great detriment, that, after an application here, justice is denied, as that is the grievance on which war is justifiable.

The Court will be competent to make special provisions for taking the accounts adapted to the special nature of the case.

It has been thrown out, that the Nabob, when he has got the money, might declare war, or invade the Company's territory, by the assistance of the money so recovered; but the Company might repel that by a war. The same objection might be made against an individual suing, that though he was not an alien enemy now, *France* or *Spain*, (of which he is a native) may declare war. The Court could take no notice of such an objection.

As to the objection respecting the Board of Control; their jurisdiction is confined to matters relative to the territorial possessions, and has no power to affect any debt the Company may owe. Their authority does not prohibit the recovery of a debt here. But suppose they had any such power, the Court could not say, that, on that account, they would not proceed; they must wait till the Board of Control did actually interfere. The same objection might have been made in *Moodaly v. The East India Company*: but, in fact, the Board of Control have no such power. They cannot be made parties, they have no interest; you might as well say, that where the money which is the cause of suit, is in the hands of the sheriff, the Court of *King's Bench* should be parties, as having authority over the sheriff.

Mr. Attorney and Mr. Solicitor General, Mr. Mansfield, Mr. Rous, and Mr. Stratford, for the defendants.

The plaintiff has no cause of suit in a Court of Equity.

The proper order in which to consider the matter is, first, what is the question out of the record. 2d. To examine the record itself. 3dly. To examine whether out of the facts the question results. 4thly. If it does, whether this court, as a court of municipal jurisdiction, can say the plaintiff has a good cause of suit.

The general question is, whether a sovereign power can sue or be sued in a court of municipal jurisdiction, in matters relative to his sovereignty; or whether any action can be maintained on agreements similar to this. Supposing it should be allowed that a sovereign may sue an individual, it will not follow that he may sue the sovereign of this country in his own courts. They are bound to make out, that a sovereign can sue and be sued, in order to maintain the position they contend for.

With respect to the bill itself; there is nothing material upon the face of it. It was impossible to demur to it, unless it could have been upon the ground of the plaintiff's being a sovereign prince, it would have been improper to demur to it for want of parties, (the members of the Board of Control.) It is not easy to know what account it seeks with respect to the agreements of 1781, it states, that Lord *Macartney* was empowered to receive the revenues; as to the second agreement, it states that the Nabob was to be restored on the payment of certain sums. It contains no statement of the final settlement. If this sovereign

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sovereign power was really coming to this country, and suing for justice, it would be incumbent upon him [\*] to state his whole case to show what was the object of the agreements, to enable the Court to direct such an account as would meet the case.

The judgment on the plea has not touched on the merits of the record.

The same answer may be given to the question, why an action should not be brought, as to that why a bill should not be filed.

With respect to giving security for the payment of costs, and of the balance; the Court has required of foreigners security for costs; but there is no instance of security for a balance, though it is not to be doubted the Court would find no difficulty in ordering it where the case required it.

The judgment when pronounced, must be as compulsory on the plaintiff as the defendant, for the defendant might file a cross bill, and put the plaintiff in the situation of a defendant, and might stop the proceeding on one bill, till the other was answered.

But suppose the Court to order security to be given for the payment of the supposed balance, that would not discharge the person; and then there would be this difference between a sovereign prince and a mere alien, that the plaintiff (in the second cause) swearing to a balance, would be entitled to a writ of *ne exeat regno*. This would be the case of an alien friend, Would it extend to a sovereign prince?

If such circumstances of inconvenience arise in every step of the proceeding, it shows there is a principle on which the Court cannot proceed.

The turn of the argument has been, that the *East India Company* are not sovereigns. We do not contend they have all the attributes of sovereignty. It is sufficient for us, that they can make treaties as to their territorial dominions; and supposing the charters do not give them such sovereignty, [\*] as to make treaties *de jure*, if a sovereign prince enters into contracts with them as sovereigns, he can have no other remedy than such as arises out of the contract. If the parties treat each other as sovereigns, it will not be material, whether the *East India Company* be really to be treated as a sovereign or not.

For the purpose of making peace and war, federal negotiations are necessary; and unless the legislature have mistaken their power, they certainly have conferred such powers on the Company.

The Court will examine the charters. It cannot but take notice that the *East India Company* is a part of the public, and of the history of that Company's transactions; but, if it takes notice of the facts on the record, it will appear that they have been in the habit of making treaties, which constitute a state of peace or war.

If, after they had treated in the character of sovereigns, they had discovered that they had not that character, and had applied to the courts of the *Nabob*, might he not have said, "I will not consider what you really are, but the agreement must be understood to give the remedies, only, which arise from federal agreements, if you have dealt as sovereigns and are not so, that will not give you a right to sue in the municipal courts;" and this would be a full answer, if the agreement was of a federal nature.

Under this agreement, a considerable debt is allowed to have accrued from the plaintiff to the defendants. If the Company could state a reasonable apprehension that this debt would not be paid, that would be sufficient to entitle them to retain any balance they might have in their hands. All the writers hold, that one state may retain what is due to another state, if they can show a reasonable apprehension, that it will be used to their detriment. But is the *East India Company* to disclose to this

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this Court all the grounds of this apprehension? The legislature has placed them in a situation that has made it impossible to do it: the circumstances are such as ought to be kept secret.

[\*] With respect to the agreement of 1781, it grew out of an alliance, and the Court will take it for granted, that alliances are political alliances. The troops were paid, and the war managed by the *East India* Company, and from thence the debt arose, so that the answer itself shows, that the agreement was relative to peace and war. It was agreed that the Company's servants should be let into possession of the revenues (among other purposes) to provide for their common defence. If this was a federal agreement it must be like the case where individual rights are affected by federal agreements; they end with them: yet federal agreements are competent to dispose of individual rights.

With respect to *Penn v. Lord Baltimore*, 1 Vesey, 444, a distinction was taken there, that the parties were both individual subjects of this country.

By the agreement of 1785, it is more clear, that the transaction was relative to their territorial possession, and therefore clearly in the nature of a federal treaty.

Could the Company apply here for an account of the rents of the Nabob's territorial possessions, or could it be in the contemplation of the parties, that treaties respecting their territorial dominions should be carried into effect by courts of justice? On the contrary they must have considered them of such a nature as only to be carried into execution by force.

One does not know how to compare this with cases determined by the Court, that there is a policy which prevents wages relative to a state of war. But the circumstances of this case deny, at every turn, that the action can lie.

We do not dispute that an alien may sue, but though a sovereign prince may in some cases sue an individual, yet where one sovereign is dealing with another sovereign upon matters of sovereignty, no cause of action can arise from those transactions.

We do not mean to deny the positions of the writers, as to the failure of justice being the legitimate cause of war: but is there a failure of justice? It is not fair to say, there is a failure [\*] of justice, where the party applies for it in the wrong place? If the *East India* Company is to be treated as part of the delegated authority of the state, then the state is bound to do justice to the Nabob, and the proper officers of state, upon proper application to them, will discharge that duty. On the other hand, if it be the effect of their treaty, that the Nabob is only to look to the *East India* Company for performance of it, there is no failure of justice, if he has no other remedy.

As to the necessity of making all peaceable applications before recourse is had to war, that is the doctrine of the authors, as to reprisals. But the question in the present case is, Whether those applications are to be in this court?

It is impossible to say, that in 1781, at the time of making this treaty, the Company were not sovereigns competent to make peace and war. The king, by his charters, and the legislature, by the acts of parliament, have treated them as such; can they have a power of making peace and war without having the power of making treaties incidental to the peace and war so made? If so, the war once made must be eternal. They must, therefore, have all the powers incidental to those of making peace and war.

In some of the original charters, it is true, the Company was considered as a mere trading company; but, in others, the Crown (with the assent of the other branches of the Legislature) has given them the power

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power of making peace and war, and of possessing territories which may be acquired by the war, reserving to the Crown the *dominium directum* of all their territorial possessions. This is the general tenor of all the charters and acts, except where a particular control has been interposed.

The next question is, Whether the treaties in question in the cause are not treaties respecting the public business of the contracting parties? And this appears from the subject-matter of all the treaties.

Then, with respect to the point of inconvenience — that argument arises to a much greater height in this than in any of the cases cited. — There is no case where one sovereign power treating [\*] with another sovereign power, can afford that transitory matter of suit, which gives rise to actions in courts of municipal jurisdiction. But there may be instances where a sovereign may sue an individual, even on matter arising out of a treaty, as in the case of the *Brazil* wood; but suppose that had been cut under the authority of the King, could the King of *Spain* have sued the King of *England* in his own court? Could he have a petition of right? Can any foreigner have that petition; which depends on the *right* of the subject?

In the case of the King of *Spain*, it was against an individual; but, in fact, it is only a solitary case, where the right was not objected to, and the argument upon it in the books affords no light upon the subject.

The case mentioned of the King of *Prussia* was the case merely of a personal right.

All the property of the King, here, is held to be *jure coronæ*, and held in his character of king.

With respect to the nature of public treaties, *Burlamaqui*, in his second book upon Political Law, chapter the ninth, makes the distinction, “ we understand, by public treaties, conventions which can no otherwise be made than by public authority, and which sovereigns, considered as such, make among themselves upon matters directly interesting the state: this distinguishes them from conventions; not only from such as are made by individuals between themselves, but from those contracts which sovereigns make relating to their private affairs.” And *Vattel*, b. 2. c. 12. treats particularly on this distinction.

It is certainly very true, that individuals derive rights from public treaties; such are those derived under the commercial treaty with *France*: and it is certain that courts of justice will look to those treaties as the rule to be followed in the cause; but those treaties are, from the nature of the subject, to be carried that way into effect, — they must be enforced in the municipal courts of the contracting parties: but it is competent to the sovereign, at any time, by different treaties, to vary the rights of individuals.

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[\*] As to neutral subjects suing in our courts: — that arises from the necessity there is that, in every country, there should be a *forum*, in which the neutral subject may assert his property in the captured ship.

On the ground of general inconveniences: — if the Nabob and the Company have acted towards one another as sovereigns, they have assented, between themselves, that the municipal courts shall not decide between them. Suppose the *East India* Company were now suing in the Nabob's court, would it be reasonable, or would the argument be endured, that they were individuals who had represented themselves, and acted as sovereigns? Consider the nature of the contracts themselves — Suppose the *East India* Company were to declare war against the Nabob for the breach of the contract, could that be considered as a fraud upon the agreement?

What remedy can there be if, upon taking the account, there should be

larice in favour of the Company? Against the person of the here can be none: with respect to a private alien, the Court enforce a security, and compel the production of books, and

a court of civil jurisdiction cannot give a complete remedy, that shews it was not intended to refer the execution of the agreement to their authority.

If the Court acts on this transaction, it must act on the territorial possession of the Nabob; though it is said, on the other side, that it is not on the territorial possessions of the Company: but it imposes on this Court to act on the territory of a sovereign prince. Can it exact an account of revenues of the *Carnatic*, and how those revenues have been applied, and whether they have been properly applied, because, if improperly applied, they might have a right to have been funded?

How can it be a reproach to the justice of a court, that it does not undertake that which it cannot perform? And that, too, in a case where the parties to the contract must have known, at the time of it, that it could not be carried into execution here?

With respect to the Board of Control, they have a power of sending orders to the servants of the Company in *India*, as to all matters of revenue and peace, and touching the civil and military government of British territories in *India*. It cannot be argued that they have no authority over this case, because it does not relate to the territory; or secrecy may not be necessary in the conduct of these transactions. The question is, whether this is a matter relative to the civil and military government of *India*, the King must decide whether it is so or not. Suppose the *East India* Company willing to give the discovery, the Board of Control may say, it is a matter that requires secrecy and bring it before the Council Board.

There is a ground of policy that a wager shall not be laid as to the revenue of a country, it will be extraordinary if the Court will direct the amount of the revenue of a country. If two states assign the portion of particular revenue for a given purpose, that cannot give a right to the *quantum* of that revenue in the court of a third person.

As argued, that although the Court could not specifically perform the agreement, that would be no reason against its entertaining the suit. It must be the strongest reason that, if it cannot carry the agreement into complete execution, it will not compel the payment of the debt, which is the consideration for it.

Suppose the Company had information that the Nabob would not perform his part of the agreement, and that it would be necessary to the possession of his territory, would the Court say the Company must discharge its debt, and leave it to the Nabob to perform his part?

A Commissioner *Eyre* (during the argument) asked, whether it had been considered as the duty of the Court, wherever there had been mutual transactions, to decree an account? He observed, that, in early transactions, it appeared there had been a debt acknowledged on the part of the plaintiff, and provisions had been made for the liquidation of this debt: that, by subsequent transactions, the debt had been increased, so that it was probable the balance in the defendant's favour could be but [\*] small. But, in the event of the balance turning out the other way, it was doubtful what the Court would do, considering all the inconveniences of this case, or whether it ought, under such circumstances, to grant an account.

The learned counsel mentioned a case of *Sherman v. Sherman*, 2 Vern. 276., where, on a ground of inconvenience, the Court had refused an account.

*Stratford* mentioned a case of *Sturt v. Mellish*, 2 Atkyns, 610., where,

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The Nabob of Arcot  
against  
The East India Company.

[ \*197 ]

[ \*198 ]

1793.

The Nabob  
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against  
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India Com-  
pany.

where, accounts being very much entangled, the Court dismissed the bill.

And this day (28th *January*) the Lords Commissioners being reminded that this cause stood undetermined,

Lord Commissioner *Eyre* said, they would certainly not leave it to be re-argued, that he meant to have given judgment in it more at length, but that the bill must be dismissed. The circumstance of the *East India Company* consisting of subjects of this kingdom, had nothing to do with the matter: the Nabob treated with the *India Company* as with an independent sovereign. He said further, that the Court considered this matter independent of the opinion of Lord *Thurlow*, as their determination went on the facts disclosed by the Company's last answer, by which it appeared, that the whole was a political transaction.

Bill dismissed: (2)

(2) The plaintiff appealed to the House of Lords, but on the day when it stood for hearing the Directors of the *East India Company* received an account of his death: which ended the dispute. See the report 2 *Ves. jun.* 62. The plaintiff, it appears, had also, previously, presented petitions to the King in council, and the two Houses of Parliament without effect. *Vide* 2 vol. *Hargr. Jurid. Argum.* 375.

The Lords Commissioners this day resigned the Great Seal, which was immediately delivered by His Majesty to *Alexander Lord Loughborough*, Lord Chief Justice of the Common Pleas, with the title of Lord Chancellor.

[\*199]

[*Vide* S. C.  
2 *Ves. jun.* 62.]

*January* 29.

A person who is master of both funds charges a debt which was personal on the real estate, his heir shall not have it exonerated by the personal estate. (1)

[\*] HAMILTON against WORLOY[LEY] and Ux.

(Reg. Lib. 1792. A. fol. 362.)

**JOHN WORSFOLD**, being seised in fee of an estate called *High Ashes* in the county of *Surrey*, made his will bearing date some time in the month of *June*, 1736, and thereby bequeathed a legacy of 600*l.* to his daughter *Elizabeth Rouzier*, and after several other bequests, devised all his messuages, lands, tenements, and hereditaments whatsoever not otherwise disposed of, including the abovementioned estate, to *Johannes Worsfold* his only son and heir at law, to hold to him his heirs and assigns for ever, subject to the payment of all his debts legacies and annuities thereby given; and he gave all his personal estate to the said *Johannes Worsfold*, and appointed him sole executor.

*John Worsfold* died some time afterwards leaving *Johannes Worsfold* his only son and heir at law, who proved the will, and entered into possession of the said estate called *High Ashes*, and all the real and personal estate of the said testator, and held and enjoyed the same till the time of his death, which happened in *August*, 1761.

*Johannes Worsfold* (the son) in order to secure the payment of the legacy of 600*l.* to his sister *Elizabeth Rouzier*, which then remained unpaid, by indenture of mortgage, bearing date 15th *May*, 1761, (re-

(1) See *Lawson v. Hudson*, ante, 1 vol. 58., *Duke of Ancaster v. Mayer*, *ibid.* 454., *Earl of Tankerville v. Fauvel*, 2 vol. 57., *Tweedell v. Tweedell*, *ibid.* 101. 152., *Billinghurst v. Walker*, *ibid.* 604., and the Editor's notes.

citing,

*inter alia*, that the legacy of 600*l.* still remained unpaid, and the said *Johannes Worsfold* had taken upon himself the burthen of executorship, and a memorandum of the 10th of October, 1743, had been signed by the said *Johannes Worsfold* and his sister *th Rouzier*, thereby agreeing that he would secure to her the t of the legacy), demised the said estate called *High Ashes* to *l Elizabeth Rouzier*, her executors, administrators, and assigns, term of 500 years, subject to redemption upon payment of the m of 600*l.* with interest at four and a half *per cent.* and the covenants for payment of the principal and interest were therein l.

said *Johannes Worsfold* being seised of the equity of redemption said estate, made his will bearing date the 9th of December, and thereby (*inter alia*) devised the said estate to [\*] the said *th Rouzier* during her life, and after her decease, to *Johannes and Richard Rouzier*, her sons, and their heirs for ever, as in common, and appointed her, and *Evershed Haynes* executrix ecutor of his will.

codicil dated 30th February, 1761, the said *Johannes Worsfold* l several devises in the will respecting other real estates not now ion. And by a subsequent codicil dated 5th of August, 1761, he d all his freehold estates in *Ewhurst* to be sold immediately after ease, and the monies arising therefrom to be applied in the t of all his debts of what nature or kind the same should consist at *th*, and also the legacies given by his will, and funeral expences, bate of his will and codicils, and all other expences relating thereto, the trust thereby created, as apprehending his personal estate not ear sufficient for discharging the same, and in case there should money remaining, which should so arise from the sale of the said after such payment and applications, then he thereby gave and thed such remaining overplus money unto his sister *Ann Wors* or her own separate use and benefit, and in case the monies to rom such sale should not be sufficient to answer the purpose id, then he directed certain copyhold lands to be sold for the rpose, and in case there should be any overplus money, so arising : thereof after payment of all his debts, legacies, and other out- as aforesaid, then he bequeathed the same unto and among all ces, the daughters of *Evershed Haynes*, to be equally divided m them, and in case such copyhold lands should not be sufficient, e directed the sale of other copyhold lands for the like purpose, case there should be any overplus money after payment of his &c., he gave the same to his said nieces as aforesaid, and he di- , that all the rents and profits of the said estates should be taken ceived by his trustees and applied in the payment of his debts, m, and other disbursements incident to the execution of his will, : considered as assets for that purpose.

testator *Johannes Worsfold* died the 9th of August, 1761, it revoking his will and codicil, otherwise than as aforesaid, and t altering the devise of the estates at *High Ashes*, in his will, as recited.

*Elizabeth Rouzier* and *Evershed Haynes* proved the will and l; and the personal estate of the testator not being nearly suf- for the payment of his debts and legacies, they sold the real of the testator particularly devised by his last codicil, for that se, and applied the monies arising from such sale in the manner y directed, and it appeared by the answer of the defendants y and wife, the personal representatives of the said *Elizabeth* r, that all the monies arising from the sale had been exhausted

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[\*200]

[\*201]



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for such purpose, except a small overplus of 93*l.* which was afterwards paid over to the testator's nieces.

*Elizabeth Rouzier* also entered into possession of the estate at *High Ashes* so devised to her for life, and subject to the aforesaid mortgage for 600*l.* and continued in the possession thereof, till her death.

She survived *Evershed Haynes*, the other executor, and died in *June*, 1785, without having paid off the aforesaid mortgage; she made her will, dated the 27th of *May*, 1782, and thereby gave the aforesaid legacy or principal sum of 600*l.* and the interest which would be due thereon, unto her nieces, and appointed the defendants, *Worloy* and wife, executor and executrix thereof.

Upon her death, they proved the will, and thereby became the legal representatives of the testatrix *Elizabeth Rouzier*, and of the testator *Johannes Worsfold*, and thereupon the said mortgage term of 500 years vested in them.

*John Rouzier* and *Richard Rouzier*, the devisees in remainder in fee of said mortgaged estate, died in the life-time of *Elizabeth Rouzier* unmarried and intestate, and upon the death of the survivor *Mary Hamilton* the late wife of the plaintiff, became seised of the said premises as heir at law.

The plaintiff and his wife afterwards levied a fine thereof to the use of himself and his wife, and the survivor of them in fee. She died in 1782, and upon the death of *Elizabeth Rouzier* in 1785, he became absolutely seised.

[ \*202 ]

[\*] The plaintiff insists that the mortgage for 600*l.* which was made thereon by the said *Johannes Worsfold*, ought to be paid and satisfied out of the real and personal assets of the said *Johannes Worsfold*, and the term of 500 years assigned to him; and the bill prays the usual account of such assets and that the mortgage debt may be paid thereout.

Mr. Solicitor General, Mr. Mansfield and Mr. King, contended, upon the part of the plaintiff, that this was a new case, and did not fall within the principle of *Evelyn v. Evelyn*, 2 P. Wms. 659., or any subsequent cases:

That the testator, *John Worsfold*, had not directly or specifically charged his real estates with the payment of this legacy of 600*l.* they were only intended as an auxiliary fund, and in case his personal estate was insufficient: that *Johannes Worsfold* the son was the universal legatee of his father, as well as executor; that he had assented to this legacy, and had paid his sister interest for it for some years previous to his executing the mortgage. This estate could never be considered as a trust fund, for the payment of any debt or legacy. He became personally liable to the payment of the legacy, and *Elizabeth Rouzier* might have succeeded in her action at law against him for the recovery of it. In case of a *devastavit* or bankruptcy of the party, it would have been proved as a debt within the bankrupt law. It was only converting it into a debt by the choice of the parties, and merely a personal covenant of the party. Supposing he had died intestate, his assets would have been liable.

The legacy was *originally* a charge upon both funds; and as to the executor throwing it upon the real estate, it did not make it a charge upon the land: he was master of both funds, and merely meant this mortgage as a personal security for the legacy.

The language of the second codicil of *Johannes Worsfold* plainly imports that he considered this as a personal debt, and payable out of his assets: by the word "all my debts," &c., he must mean to include this debt: the recitals in the mortgage deed, and especially, that of his *having taken upon himself the burthen of executorship*, and calling him-  
self

ator, shew, [\*] that he treated this mortgage merely as his per-  
 urity of the payment for the legacy.

*qtd.*, and Mr. Finch, (for the defendants *Worloy & Ux.*) ad-  
 hat the son *Johannes Worloy* was the devisee both of the real  
 mal estate of *John Worsfold*, but contended that the 600*l.* was  
 nts, if not primarily, a charge upon the real estate, the land  
 de by the testator a fund for the payment of the legacy, though  
 might be eased against the residuary legatee, in case the per-  
 ts had been sufficient for the purpose, of which there is not the  
 ement in the pleadings, or evidence in the cause; yet it should  
 o as to disappoint the specific legatee, as in *Rider v. Wager*,  
 328. At this distance of time, it may be fairly inferred that  
 e no, or but trifling personal assets of *John* the father, and that  
 ant as a charge upon his real estate. As to the recitals in the  
 s, they tended to prove nothing more than that *Johannes Wors-*  
 icted as the executor; and the term "burthen" related not to  
 , but to his having proved the will, and acted in the executor-  
 here is nothing in the deed to show that he considered it as his  
 debt, and as to the covenant for payment, it had been deter-  
*Duke of Ancaster v. Mayer*, (*ante*, vol. i. p. 454.) *Lawson* and  
 (Ibid. 58.) and *Billinghurst v. Walker*, (*ante*, vol. ii. 604.) that  
 not operate to make it the personal debt. As to the language  
 dicil of *Johannes Worsfold*, he could not mean that this debt  
 s included in the words, "all his debts," as it appeared by the  
 f the defendants, and would turn out to be so upon an account  
 whole of the money arising from the sale of his estates was  
 d in the payment of them, except a small sum of 93*l.* and that  
 bt of 600*l.* had been included, most of his other debts must have  
 unsatisfied.

reply, it was contended, that this was not a charge inherent in  
 e; that it was never considered as a trust fund; and that the  
 ance of the executor having mortgaged this estate, as a security  
 00*l.* could not make it liable, so as to compel the plaintiff to  
*um onere*. In the cases cited, the land was the original debtor.  
 resent, it was the personal debt of the son, who had both [\*]  
 his disposal, and had thrown the security upon the real merely  
 own convenience, and, as he might think, for more effectually  
 the debt to his sister.

*Chancellor.* —

round of the plaintiff's claim is founded upon the equity of this  
 hich enables a devisee to have an incumbrance upon the estate  
 ed as a debt payable out of the personal estate: the extent of  
 : can never go further, than as against the heir, the devisee, and  
 luary legatee. It cannot interfere with any other creditors,  
 or pecuniary legatees; no other creditors are affected by it, for  
 Court can never mean to extend this principle of equity further  
 between those parties.

uation of the plaintiff is this, the 600*l.* was considered as a per-  
 bt of the mortgagor, for unless that proposition can be made  
 ground fails. *Johannes Worsfold* was entitled to all the real  
 onal estate of his father; the real estate was made subject to  
 s made in favour of his daughter: the father died in 1738: at  
 h, *Johannes* being so entitled, might or might not pay this  
 out of this or that fund, as he and the legatee might agree: no  
 ould call upon him for any application of the *personal assets*.  
 the complete master of both funds, and might resort to which  
 ed to pay this legacy; and if he chose it, he undoubtedly might  
 : real estate liable to satisfy this demand. Five years after the

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 against  
 WORLOY  
 and UX.  
 [\*203]

[\*204]

1793.

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against  
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and Ux.

[ \*205 ]

death of the father in 1743, an express agreement was entered into between *him* and his sister the *legatee and her husband*, by which he stipulates to make a *specific charge* upon a particular part of old *John's* estates in her favour for the security of the payment of her legacy. The moment this agreement was reduced into writing, there was an end to the *personal claim*: the party could not have filed her bill in this court for an account of assets and payment of her legacy, no action at law could have been maintained; the personal estate is discharged from the demand, and the party has agreed to take a fresh security: no step, however, at that time was taken to complete this agreement, it was merely an imperfect document, signifying an intention to execute a mortgage, but in 1761 this original agreement was completed by mortgaging the [\*] estate for the securing of the payment of the 600*l.* except that it was so far varied, that instead of another estate, which was first intended, being so charged, as it was found inconvenient for that purpose, the before mentioned premises were inserted in the deed; *he* also chose to throw the mortgage upon this estate, recollecting that he had at that time devised it to his sister for her life, and afterwards to *her two sons*.

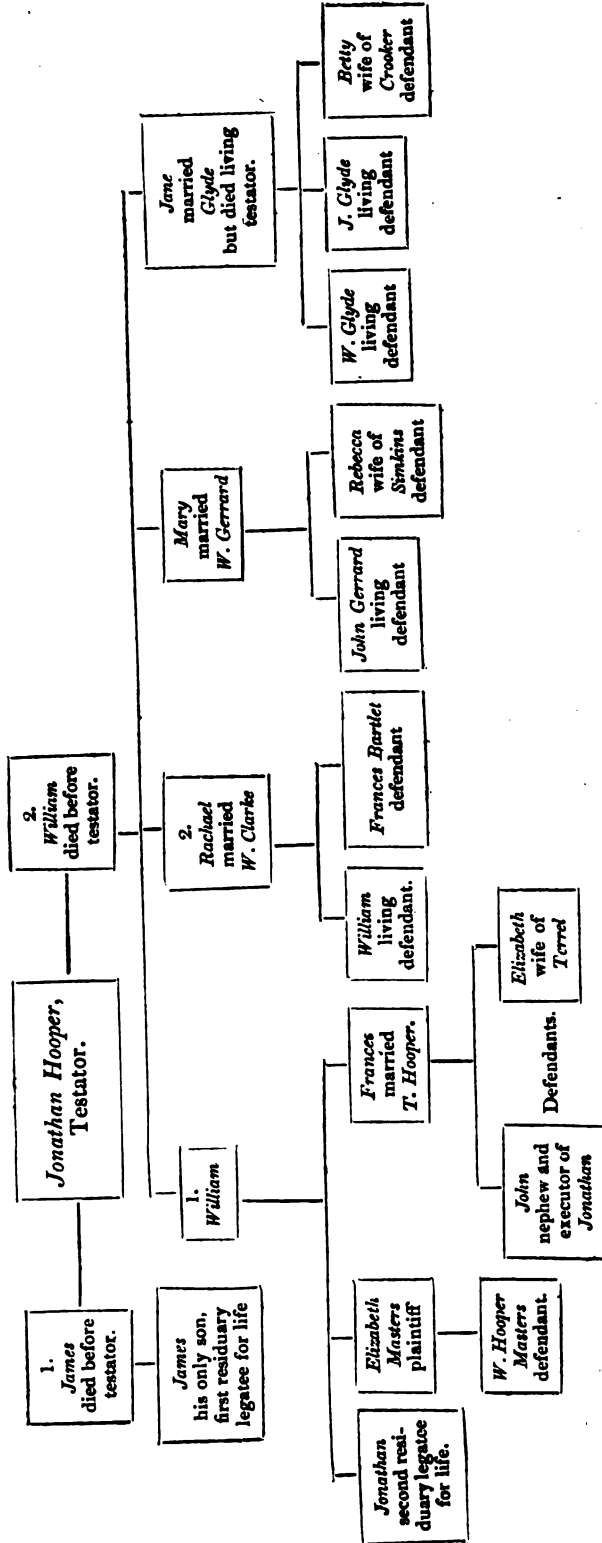
A subsequent codicil made after this transaction takes no notice of this estate, though it revokes other devises in the will, and he *thereby* directs those estates, so devised, to be sold for the payment of his debts, apprehending his personal estate would not be near sufficient for that purpose.

After these transactions, no person had a right to call upon *Johannes Worsfold* for the application of the personal estate: he had made it completely *his own*, though prior to 1743 there might have been a personal claim against him: but afterwards there was a clear bargain between the parties, to the extent of the 600*l.* as a real security, and he chuses, for the substance of his mortgage, an estate devised by him, for the benefit of the mortgagee and her family. Am I to suppose, that the general purposes of his will would be forgotten, and that he merely intended that his other estates should be sold for the purpose of carrying into execution that prior agreement, and paying off this debt, and that he meant by "all my *debts*," to include this demand? It would be too extravagant a supposition: it must also be observed, that the party herself, though privy to all those transactions, and though she survived her brother a *considerable time*, never showed any intention of resorting to his assets, or ever took any steps for exonerating the estate; she died in 1785, and this suit was not instituted till some time after her death. Under these circumstances, the plaintiff has not any right to have this estate exonerated of the 600*l.*, and with respect to any enquiry as to the application of the assets of these parties, it would, at this distance of time, be perfectly inconvenient as well as nugatory, to direct it. Therefore the bill must be dismissed with costs. (2)

(2) The Lord Chancellor "doth declare that the plaintiff is not entitled to the relief prayed by his bill, and therefore doth order that the plaintiff do pay unto the defendants their costs of this suit, to be taxed, &c. And by consent of all parties, by their counsel, it is ordered that the plaintiffs do pay the shares of the principal sum of 600*l.* given to *Elizabeth Rouzier* by the will of *John Worsfold*, and secured on mortgage upon the estate in the pleadings mentioned, and the interest thereof, belonging to the defendants *E. H.*, *M. H.*, and *M. W.*, to the said defendants respectively, &c." R.L.

# MASTERS *against* HOOPER.

## PEDIGREE.



1793.

[ \*207 ]

6th February.

NATURAL!

[ \* ] MASTERS against HOOPER and Others.

(Reg. Lib. 1792. B. fol. 209. b.)

Testator gives a residue to A. for life, remainder to B. for life, then to be divided among his (testator's) relations; this is a mere intestacy, and goes to the relations at the death of testator. (1)

**JONATHAN HOOPER**, great uncle to the plaintiff, made his will, dated *February 4th, 1756*, and thereby gave, to his ungrateful nephew, *William Hooper*, one shilling; he then gave to the son of the said nephew 100*l.* and his silver watch; and to the sisters of his said nephew, and to others of his nieces and great nieces, (daughters and granddaughters of his younger brother *William*, who had died in his life-time,) several pecuniary legacies; and having also given several charitable and other legacies, and appointed *Edward Smith* executor, he disposed of the residue as follows: "All the rest and residue of my estate, the income and interest of which I give and bequeath to my nephew *James Hooper*, of *Yeovil* (the son of his elder brother, who had also died in his life-time,) during his natural life; and, after his decease, then to descend to *Jonathan Hooper*, (the son of *William*, to whom he had given 1*s.*) my great nephew, during his natural life; and, after his decease, then the rest and residue of my said estate to be divided amongst all my relations, share and share alike," the testator died soon after making the will, and *Smith* renouncing the executorship, letters of administration to the testator were granted to *James Hooper* the nephew, and first residuary legatee for life, who possessed himself of the personal estate, paid the debts, &c. and received the income of the residue until the 25th of *June, 1787*, when he died, having appointed *Jonathan Hooper* (plaintiff's brother, and who was the next residuary legatee for life in the testator's will) his executor, *Jonathan* then entered into possession, and took the income of the said residuary estate till his death, which happened 27th of *May, 1790*, having made his will, and the defendant *John Hooper* (his nephew) sole executor.

On the death of the last-named *Jonathan Hooper* the residue became distributable.

[ \*208 ]

The bill stated the family of the testator to be as follows: that he had only two brothers, *James* and *William*, who both died before him: that *James* left only one child, *James*, the first residuary legatee for life: that *William* left four children, [ \* ] *William* (to whom the testator left 1*s.*); *Rachael*, who married *William Clarke*; *Mary*, who married *William Gerrard*; and *Jane*, who married *William Glyde*; and all the said nephews and nieces survived the testator, except *Jane Glyde*, who died before him; that *James*, one of the nephews, afterwards died *sans* issue; that *William* afterwards died, leaving *Jonathan Hooper*, (the second tenant for life of the residue,) the plaintiff, *Elizabeth Masters* (formerly *Elizabeth Hooper*), and *Frances Hooper*, who intermarried with *Thomas Hooper*, and is since dead; that *Rachael Clarke*, a niece of the testator, died, leaving the defendant *William Clarke* and *Francis Bartlet*, her only children: that *Mary Gerrard*, another niece of the testator, also died, leaving the defendants *John Gerrard* and *Rebecca Simkins* her children, and defendant *William Gerrard* (her husband) is her administrator: that *Jane Glyde*, the other niece of the testator, (who died in his life-time), left three children, the defendants *William* and *John Glyde*, and *Betty Crooker*: that the plaintiff has issue the defendant

(1) *Vide Doe v. Lawson*, 5 East, 278. &c., *Pope v. Whitcombe*, 3 Meriv. 689., *Rayner v. Mowbray*, *antca*, 3 vol. 234., with the cases there cited, especially *Whithorne v. Harris*, 2 Ves. 527., *Goodinge v. Goodinge*, 1 Ves. 231. and Suppl. 122., *Smith v. Campbell*, 19 Ves. 400. and *Coop. Ch. Ca. 275.*

*William*

*William Hooper Masters*; and her sister *Frances* left the defendant *John Hooper* and *Elizabeth Terrel*, her only children.

The bill further stated, that the defendant *John Hooper* is administrator *de bonis non* of the original testator: that *Jonathan* was personal representative of both *James* and *William*, and entitled to their shares of the personal estate of the testator; and the said *Jonathan*, by his will, gave the share which he took under his father *William* in thirds; one-third to the plaintiff, one-third to defendant *William Hooper Masters*, and the other one-third to trustees for *Elizabeth Terrel* for life, for her separate use, and, after her death, in trust for all her children living at her death. The plaintiff, therefore, claimed under the said will one-third of one-fourth of the residuary estate of the original testator, being advised, and insisting that the clear residue of his estate ought to be divided among the nephews and nieces of the said original testator who were living at his death, in like manner as if he had died intestate, and prayed an account, and that the rights and claim of the plaintiff, and other persons interested, might be established and declared.

The defendants *John Hooper*, *William Hooper Masters*, *John Terrel*, and *Elizabeth* his wife, by their answers, claimed in the same way as the plaintiff.

[\*] The defendants *Clarke* and *Frances Bartlet*, by their answer, insisted that the residue was (subject to the life estates) distributable among such of the relations of the testator as were his next of kin at the time of his decease, except such as he intended to exclude; and they insisted that *James Hooper*, to whom the testator gave an estate for life in the residue, and *William Hooper*, to whom he gave 1s., were meant to be excluded; and they submitted, that the only relations that the testator meant should take share of the residue on the death of his great nephew were *Rachael*, the wife of *William Clarke*, and *Mary*, the wife of *William Gerrard*; and that as *Jane*, the wife of *William Glyde*, died before the testator, her representatives are not entitled.

The defendant *William Gerrard* claimed in nearly the same manner, and with the same exclusions, and to be entitled to one-fourth, as personal representative of his late wife.

The defendants *John Gerrard*, *George Simkins*, and *Rebecca* his wife, and the defendants *William* and *John Glyde*, and *George Crooker* and *Betty* his wife, claimed shares as being some of the next of kin of the testator, at the death of the last-named tenant for life, and also in exclusion of the representatives of *William* and *James Hooper*.

Upon the cause coming on before the late Lord Chancellor, 21st July, 1791, he referred it to the Master to take the proper accounts, and to report who were the relations of the testator at the time of his death, and who was so at the death of *Jonathan Hooper*, the second taker for life.

The Master made his report, dated 7th December, 1792, and thereby certified, that he found that the first-named testator, *Jonathan Hooper*, died 15th September, 1756, and that his relations, then living, were *James Hooper*, (the first residuary legatee for life,) *William Hooper*, the defendants *William Glyde*, *John Glyde*, and *Betty Crooker*, (the children of *Jane Glyde* deceased,) *Rachael Clarke* (since deceased), and *Mary Gerrard* (since deceased); and he further certified, that he found that *Jonathan Hooper*, the last tenant for life named in the testator's will, died 27th May, 1790, and that the relations of the original testator then living were the plaintiff *Elizabeth Masters*, (one of the daughters of *William Hooper*, the testator's nephew,) defendants *John* [\*] *Hooper*, and *Elizabeth*, the wife of defendant *John Terrel*, (the only children of *Frances*, the wife of *Thomas Hooper* deceased,) the defendants *William Glyde*,

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*Glyde, John Glyde, and Betty Crooker*; the defendants *William Clarke and Frances Bartlet*, and the defendants *John Gerrard and Rebecca Simkins*; and he also reported what was the amount of the clear residue of the estate.

The cause came on now for further directions, when

Mr. *Solicitor General*, and Mr. *Ainge* (for the plaintiffs), and Mr. *Mansfield* (for the defendants in the same interest), argued that the word *relations*, in a will, was always taken to mean the same persons as would take in the case of an intestacy (excluding the wife :) that it was not necessary to cite cases to prove that this was so, wherever there were not words of exclusion, and that there was nothing in this case to take it out of the rule: that here it would be contended, that the testator having given some of them legacies, would bar them from taking the residue, and particularly that the giving the nephew *ls.* would bar his representatives; but it would be impossible to argue this, as if he had survived the last taker for life, he must have taken a share of the residue: that there are cases where the gift has been to one for life, and then to the children, that the Court has said, only those living at the death of the tenant for life should take, but that is only where words are used not so extensive as *relations*, which has always been held to relate to the death of the testator.

Mr. *Miford* and Mr. *King*, on the other side, mentioned *Harding v. Glyn*, 1 Atk. 469., and *Hands v. Hands*, Rolls, 24th January, 1782, (cited *ante* vol. 3. p. 69.) as shewing that the relations living at the death of the last taker for life were entitled.

But Lord *Chancellor* held it a mere intestacy. (2)

(2) And declared that the clear residue of the said testator's personal estate bequeathed by him to all his relations, subject to the life-interest therein of *J. H.* his nephew, and *J. H.* his great nephew, belonged to such of the said testator's next of kin as were living at the time of his death; namely, *J. H. &c.* R. L.

[8. C. 2 Ves.  
jun. 67.]

9th February.

### *Ex parte BROWN.*

Commission of  
bankruptcy  
superseded  
being against  
an uncertifi-  
cated bank-  
rupt. (1)

[\*211]

A PETITION to supersede a commission of bankruptcy, because it was issued against an uncertificated bankrupt.

[\*] Mr. *Mansfield*, and Mr. *Cox*, in support of the petition, cited *Martin v. O'Hara*, Cowp. 823.

Mr. *Solicitor General* and Mr. *Cooke*, on the other side, cited *Ex parte Solomons*, 22d December, 1791, and observed, that by the bankrupt laws, the assignees are to pay the overplus, (if any), to the bankrupt or his assigns; and the question would be, whether the assignees under the second commission would not be those assigns. The question in *Martin v. O'Hara*, was not whether the commission itself was good, but whether the certificate obtained under it would discharge the bankrupt. The proposition as laid down, (that the commission is invalid) goes too far; for the bankrupt may trade again, and if he gains more than pays his former debts, the surplus is for his own use. *Troughton v. Gitley*, [Amb. 630, (2)] before Lord *Camden*. Second commissions have been

(1) *Vide Ex parte Martin*, 15 Ves. 114., *Ex parte Crew*, 16 Ves. 236., *Ex parte Remson*, 1 Ves. & Beames, 160. 163. &c.

(2) Lord *Eldon* C. said, in *Ex parte Martin*, 15 Ves. 116.: "With respect to *Troughton v. Gitley*, very great difficulties occur upon that case; and, though it was the decision of Lord *Camden*, it has never been considered as of very high authority."

sustained

sustained over and over again. During the whole of Lord *Hardwicke's* time, where there was a commission against partners, there might be a separate commission against the individual. So there may be two commissions subsisting at the same time against the same person. The case *Ex parte Proudfoot*, 1 Atk. 252, went on the ground that a bankrupt was incapable of trading: but that has been decided otherwise, *Chippendale v. Tomlinson*, 1 Cooke's Bank. Laws 459. *Ex parte Cooke*, 2 P. Wms. 500. 3 P. Wms. 23.

Lord Chancellor.

There can be no doubt. Lord *Hardwicke* lays it down directly, in the case cited, that there cannot be a second commission during the subsistence of the first, but he would not suffer the creditors to quarrel with an act done by their own consent; in that case, all the creditors came in and received the money.

The second commission, during the subsistence of the first, can have no operation: both that and the certificate would be void at law. The law having vested all the bankrupt's property, and even possibility, in the first assignees, the second commission can have nothing to operate upon.

The suffering a second commission to go on, when under the second there can only be an account of debts, would be very improper; if the second commission was not void at law, they could not stand together.

Commission superseded.

1793.

*Ex parte*  
BROWN.

[\*] WALLOP *against* BROWN.

[\*212]

(Reg. Lib. 1792. B. fol. 125.)

12th February.

MR. *Mitford* moved, that exceptions to the answer of the defendant, *Martha Brown*, might be referred to the Master, and that she (being in custody for want of an answer) might be detained in custody

Order that  
the Master may  
proceed on  
exceptions to

an answer put in by a person in custody for want of an answer, *de die in diem*, but the defendant cannot be detained in custody (1); and the bill of costs must be delivered immediately.

(1) The existing practice seems to be, that if a party is in custody for want of an answer, either before exceptions, or after exceptions allowed, he is entitled to his discharge upon putting in his answer, or further answer, and paying or tendering the costs of his contempt: with this exception, that if he puts in three insufficient answers he must remain in custody; and answer (as the phrase is) in vinculis. Until the fourth insufficient answer, therefore he is to be released without waiting for the Master's report; even if the plaintiff has referred back, for insufficiency, the answer upon which he was discharged. If that should be reported insufficient the plaintiff may take the defendant again under his former process; unless he has accepted the costs. If he has done so, he must have a new order; which is, however, of course. See *Bailey v. Bailey*, 11 Ves. 151., *Child v. Brabson*, 2 Ves. 110. A plaintiff seems rather hardly dealt with by such a practice, and it may be suggested whether it ought not to be corrected. It is very remarkable that Lord *Loughborough* did, on a subsequent occasion, when the principal case came on about a week afterwards, after the Master had allowed the exceptions, grant a motion that the defendant should be detained in custody until she had put in a full answer; and did not refuse the application as stated by Mr. Brown, *postea*, 222, 223. Vide Reg. Lib. 1792. B. fol. 126. b. and the notes. The profession will find from Lord *Colchester's* report, *ibid.*, that Lord *Loughborough* was aware of Lord *Hardwicke's* decisions in *Child v. Brabson*, 2 Ves. 110. &c., since that case was cited: from which the Editor conceives that his Lordship considered the circumstances before him as forming a sufficient exception to so hard a rule; so that it may be submitted such a precedent might now, perhaps, be justly followed in a like instance.



1793.

WALLOP  
against  
BROWN.

till the Master made his report, and that the Master might proceed *de die in diem*.

He said it might be objected to the detaining her in custody, because she would have eight days to put in a further answer, and for this purpose referred to the *printed orders* 113, but he said that referred to the costs only, and he apprehended the plaintiff might refer exceptions immediately; and it seemed a hard thing on a plaintiff, that a defendant in custody for want of an answer should be discharged upon putting in ever so insufficient an answer; but whether she could be detained in custody or not, the proceeding immediately, was certainly proper.

Mr. Lloyd, on the other side, said, exceptions are never referred immediately, except in injunction causes. When exceptions are referred, the defendant has eight days to consider whether he will submit to answer them. As to the other part of the motion, that she may be detained in custody, it cannot possibly be granted; she has a right to be discharged clearing her contempts. Where a party is taken up for not putting in an examination, he may move to be discharged on clearing his contempts. There is no instance of the party being kept in custody after the answer or examination put in, and the contempts being cleared.

Lord Chancellor ordered the Master to proceed on the exceptions *de die in diem*, but said he could not keep her in custody; and that the plaintiff must deliver the bill of costs immediately.

[\*213]

[\*] SCOTT against HOUGH.

12th February.

(No Entry.)

Attachment  
ordered, where  
*subpoena* served  
abroad. (1)

MR. Abbot moved for an attachment to take a defendant, the *subpoena* having been served abroad; and cited a case of *Burke v. Lord Macdonald*, (1) in the year 1780, where the like order had been made, and Lord Thurlow thought the service of the *subpoena* abroad a good service.

Lord Chancellor made the Order.

(1) *Bourke v. Lord Macdonald* is reported 2 Dick. 587., upon which it is observable, that, although the opinion of the profession seems at that time favourable to the practice, the case itself is by no means a decision to establish it; Mr. Dickens stating that Lord Thurlow was dissatisfied, and that "the matter dropped." *Shaw v. Lindsay*, therefore, (18 Ves. 496.) which was determined by Lord Eldon, upon the supposed authority of *Bourke v. Lord Macdonald*, is unsupported; and open to the doubt then evidently entertained by Lord Eldon.

THIS day, being the last day of the Term, Sir James Eyre, Knight, Lord Chief Baron of the Exchequer, took his seat as Lord Chief Justice of the Common Pleas; and Sir Archibald Macdonald, Knight, His Majesty's Attorney General, was called Serjeant, and took his seat as Lord Chief Baron of the Court of Exchequer; and, on the next day, Sir John Scott was sworn Attorney General, and John Mitford, Esq., was appointed Solicitor General, and received the honor of Knighthood.

## [\*] PICKERING against The Earl of STAMFORD.

(Reg. Lib. 1792. B. fol. 239. b.)

[\*214]

[Vide S. C.  
2 Ves. jun. 272.  
and 581.]  
Rolls, 16th Feb.

THE bill filed 7th April, 1792, by the plaintiff as nephew and administrator of *Peter Pickering* deceased, nephew and one of the next of kin of the testator, prayed an account of the the personal estate which the testator, *Thomas Walton*, was possessed of, or interested in at the time of his death, and which had been possessed or received by, or by order, or for the use of *Mary*, late Countess of *Stamford*, or *Henry*, late Earl of *Stamford*, in her right, in their respective life-times, or by *George Henry*, the present Earl of *Stamford*, since their deaths, and particularly of all such parts of the testator's personal estate as consisted, at the time of his death, of money placed out upon mortgage, or other real securities, and for an account of monies paid by the executors of the testator, and that the legacies and bequests given by the said testator's will and codicil of any part of his personal estate which was invested in any mortgage, or other real securities, to charities, or for any charitable purposes, may be declared void, and the said last mentioned particulars of the testator's estate may be declared to be undisposed of by the testator's will, and that the same, or the remainder thereof, after contributing rateably with the rest of the testator's personal estate, in payment of debts, funeral expences, and legacies, (other than the charity legacies) may be declared to be distributable among the next of kin of the said *Thomas Walton*, living at his death, (save and except his widow) as undisposed of by the will and codicil, and that the same, together with the interest, &c. thereof, might be divided into three equal parts, and one of such shares be paid to the plaintiff, as representative of *Peter Pickering*, one of the said next of kin, and that the wife might be declared to have accepted the provision made for her by the will, in lieu of her share of the personal estate, and if the defendant should not admit assets of the late Earl and Countess, he might account, &c.

Bill, by next of kin, for personal estate secured by mortgage, given to a charity. The will was dated in 1754. No bill was filed till 1792, yet his Honor would not dismiss the bill, but ordered a reference to enquire into circumstances. (1)

For this purpose, the bill stated, that *Thomas Walton*, late of *Dunham Woodhouses*, within *Dunham Massey*, in the county of *Chester*, made his will, dated 22d August, 1754, whereby the testator, after giving certain particulars of his real and personal [\*] estate to his wife, *Mary Walton*, in satisfaction of dower or thirds, gave and bequeathed to his executors and executrix 1000*l.* to be paid and applied to such charitable uses as he should, by any deed or writing, or by any codicil to his will, appoint, and in default of such appointment, to and for such charitable uses, to be founded, created, and subsist in the township of *Dunham Massey*, as his executors should appoint; and he gave the residue of his personal estate, after payment of his debts, &c. and after payment of the expence of putting in a life in the room of his own life, in his leasehold estate held for lives, to *George Earl of Warrington* deceased, *Mary Countess of Stamford* deceased, the Right Honorable *George Henry*, now Earl of *Stamford*, (by his then description of Lord Grey) and the Honorable *Booth Grey*, for their own proper use and benefit, and appointed them executors and executrix of his said will.

[\*215]

The testator made a codicil to his will bearing date 23d of August,

(1) For the subsequent stage of the cause see 1 Ves. jun. 581. *et seq.* Upon the point of length of time affording a presumption to bar a demand, *et c. contra*, vide *ibid.* *E. Deloraine v. Broune*, *antea*, 3 vol. 633., with the Editor's notes, *Jones v. Turberville*, and *Andrew v. Wrigley*, *antea*, 115. and 125., *Hercy v. Dinwood*, *postea*, 251., *Whalley v. Whalley*, 1 Meriv. 436, *et seq.*, *Chalmer v. Bradley*, 1 Jacob & Walk. 51. 59, &c.

1793.

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against  
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1755, whereby (after several recitals, and particularly reciting the said residuary disposition) he directed and appointed that his executors should *lay out and dispose of all the rest, residue, and remainder of his personal estate in the townships of Dunham Massey, Bowden, and Altringham, in the parish of Bowden aforesaid, to and for such charitable uses, intents, and purposes, and in such proportions, manner, and form, as they, in their discretions, should think fit, and the testator in every other respect ratified his said will.*

The bill further stated, that the testator died 6th of February, 1757, without having revoked the will and codicil, without leaving any issue, and leaving the said *Mary* his widow, *Joseph Walton* the elder, his only brother, the said *Peter Pickering* the only child of *Dorothy* the late wife of *Peter Pickering* deceased, his (the testator's) sister, and *Thomas Neild*, *George Neild*, and *Elizabeth Neild* the children of *Jane* the late wife of *John Neild*, the only other sister of the said testator, (which said *Dorothy Pickering*, and *Jane Neild*, died, living the testator) his, (the testator's) next of kin, him surviving.

[ \*216 ]

The bill then stated, that the testator's personal estate, at the time of his death, was very considerable, and that the Countess of *Stamford* alone proved the will and codicil, and that she and her husband *Henry* late Earl of *Stamford*, possessed themselves [\*] of the personal estate to a large amount, much more than sufficient for payment of debts, legacies, &c., including the charitable legacies, and that after payment thereof, there remains a very considerable residue.

It stated the death of the late Earl of *Stamford*, having appointed the Countess his executrix, and of the Countess, having appointed the defendant the Earl her executor, and that he had since proved the will of the testator *Thomas Walton*, and had possessed himself of the personal estate of the Countess, and of the said testator, that *Booth Grey* had never either proved or acted.

It then stated the particulars of the personal estate of the testator, and contended that the pecuniary and residuary bequests given by the will and codicil to the charitable purposes, so far as the same affect, or purport to be a disposition of any particulars of the said testator's personal estate as were out at interest upon mortgages, or other real securities or security, are and were, by law, null and void, and that such particulars, after contributing rateably with the other general personal estate of the said testator, to the payment of his debts, legacies, (other than the charitable legacies, &c.) together with the interest, &c. thereof, are distributable among the testator's next of kin (except his widow) according to the statute of distribution, as being undisposed of by the will and codicil.

The bill then stated, that the widow had accepted the provisions made for her by the will, the death of the several of the next of kin, living at the time of the decease of the testator, and who were their representatives, in order to shew who were now entitled to distributive shares, and claimed one third of the residue, as representative of *Peter Pickering* deceased.

[ \*217 ]

The defendant, the Earl of *Stamford*, by his answer, admitted the will and codicil, and the death of the testator, and that he left a widow and *Joseph Walton*, his brother, surviving him, but as to the other parts of his family, denied any knowledge. He admitted that Lady *Stamford* was the sole acting executrix, and said that she had kept a book containing regular accounts of her executrixship, and that he had done the same since her decease, and referred to such books, and stated the account [\*] of the personal estate of the testator, as appeared by such book, and it appeared by such books, that there was a considerable sum secured by mortgages, and further said, that the said *Mary* late Countess

Countess of *Stamford*, conceiving that the residue of the testator's personal estate was applicable to charitable purposes, applied the interest, and part of the principal sum of 7560*l.* in building and erecting a charity-school and school-house, called *Seaman's Moss School*, in *Dunham Massey*, and that the books contained an account of what had been expended thereon, and set forth the state of the account at the death of *Lady Stamford*; 10th of *December*, 1772, and said he then undertook the management of the trusts, and stated the application thereof, and submitted to account for the same, and submitted to the Court, whether the bequests made by the said testator's will and codicil of any part of his personal estate ought, at this distance of time, and after the same have been applied to the charitable purposes mentioned in the testator's codicil, to be called in question, and whether the debts, &c., of the testator ought not to be paid out of such part of the testator's personal estate, as was invested on mortgages or other real securities, before any other part of the personal estate, so that a larger fund may be left to answer the charitable intentions of the testator.

It appeared in the cause, that, at the time of the testator's decease, his next of kin was his brother *Joseph Walton*, to whom he left by his will 5*l.*, and *Peter Pickering* his nephew, to whom and his sons he gave 1500*l.* *Thomas Neild* his nephew, to whom he gave 300*l.*, *George Neild* his nephew, to whom he gave 300*l.* (the representatives of these were before the Court.) *Margery Neild*, his niece, to whom he gave 400*l.* (who is supposed to be dead, but no account can be learnt of her,) *Elizabeth Neild* his niece, to whom he gave 400*l.*, (whose representatives are before the Court); *Frances Neild* his niece, to whom he gave 100*l.* and *Jane Neild* his niece, to whom he gave 50*l.*, (these two last were supposed to be dead, but no account could be obtained of them.) And the testator gave to each of his executors a pecuniary legacy of 200*l.*, but generally, and not as executors; and devised the greatest part of his real estate to Lord *Stamford* and *Booth Grey*. And it further appeared that at the time of his decease, there was 6345*l.* of his personal estate; out on mortgage, of which 2000*l.* is still on the original mortgage.

[\*] Mr. *Lloyd*, Mr. *Misford*, and Mr. *Pemberton*, for the defendants, the executors.

[ \*218 ]

This bill ought to be dismissed immediately. At this distance of time, the next of kin cannot come for an account; it is to be presumed that they have released. The distinction between personal estates secured by mortgages, and general personal estate, and that the former cannot be given to charities, was well known at the time of the testator's death. The *Attorney General v. Meyrick*, 2 *Vesey*, 44. had been determined long before, so that it was not only well known by lawyers, but in the neighbourhood where this cause arises: therefore it is to be presumed, that the next of kin, who have all legacies under the will, knew their right. Yet they stood by and permitted the executrix to build a school, at a very great expence, on the presumption that the whole of the personal estate was applicable to the charities. If the application should be now declared to be void, the building will be useless, for want of a fund to support it. It would be unconscientious now for the plaintiffs to claim the property. If any enquiry is ordered, it should be, whether the persons who were the next of kin at the testator's death, and who were all of age, did not consent to the application. There are many cases in principle applicable to this, and which decide that a court of equity will not entertain stale demands, which this certainly is, *Earl of Pomfret v. Windsor*, 2 *Vesey*, 483. *Smith v. Clay*, Amb. 645. (*ante*, vol. iii. 637. n.) *Earl of Deloraine v. Browne* (*ante*, vol. iii. p. 633.)

*Attorney*

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*Attorney General v. Earl of Winchelsea (ante, vol. iii. p. 373.) Jones v. Turberville (ante, 115.)*

Mr. Hardinge, for the representatives of the widow.

No length of time or acquiescence can substantiate a disposition originally void by statute: even the express waiver of the next of kin would operate nothing in such a case. Suppose an information had been filed by the *Attorney General*, immediately after the death of the testator, could the charity have been established as to so much of the personal estate as was out upon mortgage? Certainly not. No act of the parties could make that legal which was originally otherwise. The cases cited do not apply.

[ \*219 ]

[\*] Mr. Graham, for the other next of kin.

If this question was new, the disposition of the mortgages must have been held to be clearly void. The Court is now called upon to say, that, from length of time, the disposition must be considered as good, and much has been said on the presumption of the consent of the next of kin; but this is a case where no presumption can apply.

Mr. Selwyn, in reply. — The simple question is, whether, from the length of time, the plaintiff is barred, or whether there is any equity arising from that circumstance. I contend there is not, and that no enquiry is now necessary.

This day his Honor gave judgment to the following effect;

*Master of the Rolls.*—

This bill is filed by the representative of one of the next of kin of the testator, who died so long ago as 1757, and the bill is not filed till 1792: this is almost ground enough, of itself, to say, there shall be no decree. In a common case, certainly such a suit could not be sustained, there must be very special circumstances to induce the Court to entertain it.

In this case, *Walton*, the testator, by his will dated 22d August, 1754, gave a legacy of five pounds to his brother, and legacies to all his next of kin. He then gave 1000*l.* to be applied to charities, and gave the residue absolutely to his executors. By the codicil, he converted them into trustees. It was contended, that they were only converted into trustees, so far as the property could be applied to charities: but I am of opinion that construction cannot prevail: but that they must be considered as trustees as to the whole property. A very considerable part of the property was invested on real securities. The trustees have acted very honestly and faithfully, in discharge of the trust. But it has been discovered, says the plaintiff, a few years ago, that a large part was on real securities, and, therefore, as to that, the executors were trustees for the next of kin. And it must be admitted, that, under the statute of mortmain, a bequest of money on real security to a charity [\*] is void, *Attorney General v. Meyrick*, 2 Vesey, 44.: therefore if the claim of the next of kin had been recently after the death of the testator, it could not have been resisted. The only question is whether the demand now comes too late. It is contended, by the defendant, that the bill cannot now be entertained; and certainly courts of equity are bound to set some limits to equitable demands, and to proceed by analogy to the practice of courts of law, where they presume payment of legacies, of bonds, and even of judgments, from length of time. Every inconvenience will arise here, that was meant to be prevented by the statute of limitations. It is said no time will bar an equity: but that is not true; though it is so of fraud. If parties are conusant of their rights, and lie by for a great length of time, and suffer other persons to act as if those rights did not exist, they cannot be relieved. So in the case of legacies, though there is no receipt, it will be presumed they

[ \*220 ]

they are paid, *Jones v. Turberville*.<sup>(2)</sup> Therefore if this was a clear right in the next of kin, which they might at any time have demanded, they must be barred. But it is said, this is not that case, that the parties were not apprised of the law, and therefore their acquiescence does not raise the presumption of a release. And before I determine what the presumption does arise, I must be more fully acquainted with the nature of the case, and the circumstances of the parties. But it is argued, that there could be no such presumption, because it would be illegal; but though it is illegal to give money secured by land to a charity by will, it may be legally given in the life of the donor; therefore it is not *absolutely* illegal. The question therefore is, whether a presumption arises, that the next of kin, in their life-time, (for they are all now dead) conveyed their right to the trustees, or being apprised of their right, permitted them to apply the money to the uses of the charity. It is true, this presumption may be rebutted. Courts of law are much more liberal now with respect to presumptions than they were formerly. The question how far deeds may be presumed was very fully gone into, in a case of *Reed v. Brookman*, 3 Term Rep. 151., where it is laid down, that letters patent, bonds, and judgments may be presumed from length of time and enjoyment. But upon this part of the case, I shall give no opinion at present. It is objected, that if I order an enquiry, it will go with a prejudice to the Master; but I do not decide, that the bill is not, after all, to be dismissed, or that [\*] the presumption will not arise. By retaining the bill, I do not decide on this. I considered this point particularly in *Curtis v. Curtis*, (*ante*, vol. ii. p. 620.) Facts may come out upon the enquiry, that may put an end to the question; it may appear that all the next of kin did convey. I admit it would be hard that the next of kin should lose the property by not knowing the law; but if such a bill as this should be entertained as a matter of course, half the charities in the kingdom might be overturned. *Smith v. Clay*, as reported in the note to *Delo-rais v. Browne*, (*ante*, vol. iii. p. 639.) is very strongly applicable to this case in point of reasoning; it contains a great deal of sound argument as to the acquiescence of parties; though I admit a *res judicata* is stronger than the cases which have been before the Court. The determinations upon the Mortmain act, with respect to mortgages are a great refinement. There is a great difference between the wording of the statute of Mortmain and the Popery act of William 3. the construction of which is so fully gone into in *Roper v. Radcliffe*, (9 Mod. 171.) in this respect, for in that act, the words "charge or incumbrance" which are in the Mortmain act, do not appear. In *Foone v. Blount*, Cowp. 464., it was held, that a charge of debts was not such an interest in land as to be void as to a papist. I do not think myself warranted to dismiss the bill; though I wish I could lay down a rule that would enable me to do so: for there is great inconvenience, from reasons of public policy, in retaining such a bill as this. If this had been land, and a fine had been levied, it would have barred all the world; but being an equitable interest, it is contended, that it is open for ever. Suppose debts should have been paid out of this part of the property, how am I to know out of what it was paid? This is a great objection to this bill. Suppose the accounts and vouchers all to be lost: the next of kin might lie by till there were no vouchers left.

It must be referred to the Master, to take an account of the personal estate of the testator, come to the hands of, or possessed by the executors, and of his debts, funeral expences, and legacies; and he

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against  
The Executors  
of the Estate of  
STAMFORD.

[ \*221 ]

(2) *Antea*, 115.

1793.

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STAMFORD.  
[\*222]

must distinguish (3) what part of the personal estate was secured by mortgage or other securities, at the time of the death of the testator, and he must also enquire, who were then the next of kin, and their ages, where they respectively resided, and when they died, and who are their respective personal [\*] representatives; and also whether any or what part of the testator's personal estate has been applied, and in what manner, in the charities directed by the will and codicil; and whether the next of kin had any notice of the will (4), and when first, and whether they received their legacies under (5) it, and whether they or any of them released or relinquished, in any manner, their shares of the residue, and whether the widow accepted the provision made by the will in lieu of dower, &c., and the Master to state any special circumstances: and the costs, and all further directions must be reserved till after the Master has made his report.

(3) The direction was merely that he should state what was the amount of the testator's personal estate at the time of his death, and of what the same then consisted. No entry appears as to the ages, &c. of the next of kin, but the rest of the decree, as above stated, is in substance correct. R. L.

(4) "and codicil." R. L.

(5) "them." R. L.

### MUSCOTT against HALHED.

(Reg. Lib. 1792. B. fol. 120.)

Lincoln's Inn  
Hall, 19th Feb.

Practice as to  
expunging im-  
pertinence. —  
Costs.

MR. SCAFE moved, on behalf of the defendants, that the six clerk (1) with whom the amended bill is filed, may attend the Master therewith (2), in order that the Master may expunge such part thereof as he has reported to be impertinent; and that it be referred back to the Master to tax the costs of the reference, and that the costs, when taxed, may be paid by the plaintiff.

He stated, as the ground of the motion, that on the 15th of November last, an order was made, whereby it was referred to Master Eames, to look into the plaintiff's amended bill, and certify whether the same was scandalous and impertinent.

That the Master, by his report dated 14th of this month, has certified that the plaintiff's amended bill is impertinent in several parts thereof specified in the said report.

His Honor seemed to think the application very early, as it was without notice.

By several Gentlemen, as *Amici Curiae*, saying that, by the practice, the defendant was entitled to it, immediately, after the report made, as a matter of course, his Honor

Granted the motion.

(1) It is not the six clerk, but the clerk in court, who now attends. See Newland's Pract. 1 vol. 110.

(2) The motion is entered in R. L. as being merely that it might be referred back to the Master to expunge the impertinence, and tax the defendant's costs; which was ordered accordingly. It is proper to state this point of form; since it is not usual for the six clerk to attend, as stated by Mr. Brown: nor to specify who shall attend: the clerk in court attending with the record as of course. See Newland's Practice, 1 vol. 110.

1793.

[\*] WALLOP *against* BROWN.

(Reg. Lib. 1792. B. fol. 126. b.)

[\*223]

[Vide S. C. ante, 212. and the Editor's note.]

20th Feb. Practice. (1)

FIFTEEN exceptions having been allowed to the defendant's answer, and she continuing in custody for non-payment of costs, Mr. *Solicitor General* moved, that so much of the former order (*vide ante*, p. 212.) as directed her to be discharged on payment of costs, might be discharged; and he cited *Child v. Brabson*, 2 Ves. 110. He said the order to discharge the defendant proceeded on the ground that the answer was full, and that, in this case, that was suggested; and that, as the defendant was still in custody, no new process could be taken out.

Mr. *Lloyd*, on the other side, contended, that the consequence of the order prayed might be to keep her in custody a long time; and that, in a case before Lord *Thurlow*, he had refused to keep a defendant in custody during an examination on interrogatories. The constant course of the Court is, that where a defendant is in custody for contempt, he is discharged on putting in the answer or examination.

Lord *Chancellor* refused the motion (2), saying, the practice of this Court arose from analogy to that of the courts of law, where a prisoner, once supersedeable, always remains so; and having once a right to go out, cannot be detained, except on a new cause.

(1) *Mr. Brown* has wholly mistaken this case; and the decision was directly the reverse, as already noticed by the Editor, ante, 212.

(2) The Lord *Chancellor* did not refuse the motion, but granted it, and ordered that she should be detained in the custody of the warden of the Fleet until she should have put in a full and sufficient answer to the exceptions, R. L. It appears that Lord *Loughborough* did, indeed, at first hesitate on the subject. Lord *Colchester's* MS. note, which was taken in court on the occasion, is as follows:—

“WALLOP *v.* BROWNE. In Chancery, February 19th, 1793.

“Defendant being in custody on a commission of rebellion, for want of an answer put in her answer, and thereupon moved, that upon payment of costs she might be discharged.

“The plaintiff obtained an order for the Master to proceed on the exceptions taken to the answer *de die in diem*, and the answer being reported insufficient before she had paid her costs,

“*Mitford*, *Solicitor General*, moved to discharge the former order, alleging, that the answer being found insufficient, the plaintiff had proved the fact upon which the order was made, to be false; and cited, *Child v. Brabson*, before Lord *Hardwicke*, 2 Ves. 110.

“*Lloyd* on the part of the defendant, insisted, that defendant was by the former order entitled to her discharge upon payment of the costs, and that the process of contempt ought to be sued out *de novo*.

“Lord *Chancellor* was at first of opinion, that the moment the former order was obtained, the defendant, upon payment of costs, was entitled to her discharge, and that some new cause was necessary to detain her: but after further consideration, especially as to the difficulty of serving the process of attachment, &c. upon her, (she being already in custody.) He was of opinion that the order must be discharged as prayed.”

Practice.—  
Answer.—  
An insufficient answer does not entitle defendants to be discharged from process of contempt.



1793.

*Lincoln's Inn  
Hall, 23d Feb.*

## MUNDY against Earl Howe.

(Reg. Lib. 1792. B. fol. 303.)

Although, where fortunes are given to children (living the father) with provisions for maintenance that shall not be raised, but accumulate while the father is of ability to maintain the children; yet where the woman's fortune (on a second marriage) was settled to the use of herself for life; remainder to the children of the marriage, making a provision for maintenance out of the interest of the fund, the Court ordered an allowance to be made. (1)

[\*224]

[\*225]

BY indenture tripartite, dated 7th January, 1788, previous to the marriage of *Edward Miller Mundy* Esq. with *Georgiana* Lady Dowager *Middleton*, reciting the intended marriage, and that she was (*inter alia*) entitled to 41,000*l.* consol. 3 per cent. Bank annuities, and 40,000*l.* reduced Bank annuities, and had transferred the same to the [\*] defendants Earl (then Viscount) *Howe*, and *James Mansfield Chadwicke* Esq. since deceased; it was witnessed, that the whole real and personal property of Lady *Middleton* was vested in the said trustees, in trust for the said Lady *Middleton*, till the marriage, and from and after the marriage, as to the said capital sum, in trust to pay to, or authorise her to receive the dividends, &c. thereof for her life, to her sole and separate use, and not subject to the debts, &c. of the said *Edward Miller Mundy*; and, after her decease, to transfer and divide the principal sum and dividends among the children of the marriage, if any, in such shares and proportions, and at such ages and times as Lady *Middleton*, notwithstanding her coverture, should, by writing, or by her will, appoint; and, in default of appointment, equally, at twenty-one years of age; or in case of daughters, at twenty-one, or on their days of marriage; and if there should be but one child, then to such only child. And the said indenture contained a clause to the following purpose: "that it should and might be lawful to the trustees, and the survivor of them, and the executors of such survivor, and they were thereby authorised and required, after the decease of Lady *Middleton*, out of the dividends, &c. of the said funds, to pay for the maintenance and education of all and every the said child or children, for whom portions were thereby provided, and until his, her, or their portion should become payable, such yearly sum and sums of money as they the said trustees should think proper, not exceeding the interest of the portions;" and, in case of failure of issue, in trust for Lady *Middleton*, for her sole and separate use, if then living, or, if dead, for such person, &c. as she, by her will, should have appointed; and in case of no, or an imperfect appointment, then the whole, or the part unappointed, to her personal representatives. The marriage took effect, and the plaintiff *Georgiana Elizabeth*, an infant, is the only issue of the marriage. Lady *Middleton* made her will, bearing date 1st of March, 1788, and thereby gave several legacies, and left the co-defendant, *Edward Mundy* (her husband) sole executor, but did not refer, by the will, to the settlement. Lady *Middleton* died 29th of June, 1789, leaving the plaintiff, her only child by that marriage. The defendant, *Edward Miller Mundy*, proved the will, and *James Mansfield Chadwicke*, the co-trustee with Lord *Howe*, and brother to Lady *Middleton*, also died 16th of November, 1789, having made his will, and thereby left the plaintiff a legacy of 30,000*l.*

[\*] Lord *Howe* having, by the death of Mr. *Chadwicke*, become the surviving trustee, the present bill was filed, praying that a new trustee might be added to Lord *Howe*, and the funds assigned, and proper allowance made out of the interest and dividends which had arisen since the death of Lady *Middleton*, and which should arise from the said funds, for the maintenance and education of the plaintiff.

(1) See the Editor's note to *Hughes v. Hughes*, ante, 1 vol. 387, with the cases there adduced, especially *Hoste v. Pratt*, 3 Ves. 733. *Sisson v. Shaw*, 9 Ves. 285, 288. *Cullis v. Blackburn*, ibid. 470. *Moberley v. Turton*, 14 Ves. 499, 500, 501, &c.

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against  
Earl Howe.

The defendant *Mundy* (the father), by his answer, admitted the facts stated in the bill, and said that he had six children by a former wife; but, nevertheless, he did not pretend to suggest that he was not of sufficient ability, in point of fortune, to maintain and educate the plaintiff in such manner as her fortune and expectations may require; but submitted that, as an ample fund was provided by the settlement for the maintenance and education of the plaintiff, it was the intention of Lady *Middleton* to exonerate him from all expence in the maintenance and education of the children of that marriage, and therefore was desirous that an allowance should be made out of the interest of the funds.

Mr. *Mansfield* for the plaintiff, said, that the common case where a fortune was given to children during the life of their father was, that, although a maintenance was provided by the instrument by which the gift was made, there should not be an allowance for that purpose, if the father was of ability to maintain the children: that here Mr. *Mundy* admitted himself to be of ability, but prays a maintenance out of the fund settled upon the plaintiff. The present case was peculiarly circumstanced, as Mr. *Mundy* derives no benefit from the fund which was secured to Lady *Middleton* and her children by Mr. *Mundy*, exclusive of Mr. *Mundy* himself.

Mr. *Attorney General* and Mr. *Sutton*, for Mr. *Mundy*, admitted the rule to be as Mr. *Mansfield* stated it, where the fortune came from a stranger, and the father no party to the deed by which it is given; that there the Court will not discharge the father from the duty imposed upon him by nature, of maintaining his children. In such cases, the maintenance ordered by the deed has always been ordered to accumulate for the benefit of the child. It has only been held otherwise where the gift of the fund has been to the father, clothed with a trust for the [\*] child. Making the father one of the trustees, has been held insufficient to vary the rule, *Andrews v. Partington* (*ante*, vol. iii. p. 60.) But this is not like that case, it is not a provision made by a third person, but by an instrument to which the father is a party, making a provision for the children of a second marriage, the father having six children living by a former one. This is perfectly different, in as much as here it arises from the nature of the transaction, and the very words of the instrument. This was part of the contract between them. The trust was to pay the whole annual proceeds to Lady *Middleton* for life, and, immediately after her decease, to be divided among the children of the marriage at twenty-one, which, though not immediately divisible, made them vested interests in the children; and then the trust went on to apply part of the interest of the shares to the maintenance and education of the children. The clause was therefore to have effect immediately: the payment was to be made half-yearly. The first payment half a year after Lady *Middleton*'s death. It therefore might be in the life-time of the husband, and was intended, as the husband was to take no beneficial interest whatever, to throw the burthen of the maintenance and education on the fund. If this is the sense of the contract, it is impossible to apply a rule taken from cases of bounty to this case.

Lord Chancellor.

In this case the child is entitled to the whole interest; but nothing is vested till twenty-one, or marriage. It is perfectly clear, from the cases, that where the fund is given as a bounty, notwithstanding a provision for maintenance, the father, if of ability, must maintain the child (2); but in this case it is part of the execution of the trust contained in the contract. The family of Mr. *Mundy* was in contemplation

(2) But see the note to *Hughes v. Hughes*, *ante*, 1 vol. 387.

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[ \*227 ]

at the time of this contract; because there is a provision in the settlement, that they shall take nothing from Mr. Mundy but by descent or gift. This was a provision, made by contract, for the children of the marriage with Lady Middleton, out of property which, independent of the settlement, would have become Mr. Mundy's. By the settlement, Lady Middleton was left in full possession of the dominion of her own property, even against her own children; and the trustees are required to apply, at a given period, a certain proportion of the interest as a maintenance. (3) The provisions of the settlement [\*] were beneficial to Lady Middleton, and acceded to by Mr. Mundy. The Master must, therefore, enquire what will be a proper maintenance (4); but I think there ought to be a direction (5) to diminish that allowance, in respect to the great additional fortune Mr. Mundy derives from Lady Middleton.

(3) The following is Sir J. Simeon's note of the judgment.

"The Lord Chancellor, after argument, said it was clearly distinguishable from these cases, which were gifts to third persons for the benefit of the infants, but that this was the case of a contract made between the intermarrying parties, in consideration of the circumstances of Mr. Mundy, to enable him the better to provide for his children by the first marriage, and for settling her fortune to her separate use, &c. which was supposed amply sufficient to maintain the children of the second marriage. — *Referred* to the Master, to ascertain the maintenance from time past and to come."

(4) For the time past and to come, R. L.

(5) No direction of the kind appears in Reg. Lib.

### WILMOT against WOODHOUSE.

(Reg. Lib. 1792. B. fol. 276. b.)

Lincoln's Inn  
Hall, 23d, &  
25th February.

Though a gift of a legacy may release a debt, yet where the bond remains uncanceled, it must clearly express the intention so to do. (1)

THE late Admiral Byron made his will, 12th of July 1785, and thereby (*int. al.*) gave and bequeathed all his personal estate not before by his will disposed of, to the defendant Sir John Woodhouse baronet, in trust to sell and convert the same into money, and, as to the sum of 2600*l.*, part thereof, he bequeathed the same in the words or to the effect following: "As I have paid and advanced considerable sums of money for my son John Byron, and my daughter Lady Juliana Elizabeth Wilmot (meaning the plaintiff's wife, since deceased, who was before the widow of the Admiral's son John Byron,) I direct that my trustees and executors shall pay, within twelve months after my death, the sum of 2000*l.* part of the said sum of 2600*l.* to my said daughter Lady Juliana Elizabeth Wilmot," and made such disposition of the residue of the said sum, as in the said will is contained.

Admiral Byron died about 1st April, 1786, without revoking his will, and the defendant proved the will.

Dame Juliana Elizabeth Wilmot died about the 12th of March, 1788, intestate, and the plaintiff procured letters of administration to her, and applied to the defendant for his said late wife's legacy under the will of her said father.

The defendant, finding that Admiral Byron had, about the month of June, 1782, advanced (by his navy agent) to his said daughter Juliana Elizabeth, the sum of 800*l.*, for which she had entered (by her then name of Juliana Elizabeth Byron) into a bond, dated the 26th June, 1782, in the penalty of 1600*l.* for security the said sum of 800*l.* and interest, the principal and interest of which continues undischarged,

(1) See *Jeacock v. Falkner*, *antea*, 1 vol. 295. 2 Roper on Leg. 26, &c.

and that, in or about the month of [\*] *July* in that year, *James Sykes*, the navy agent of Admiral *Byron*, advanced to the said dame *Juliana Elizabeth Wilmot*, the sum of 500*l.*, for which the said dame *Juliana Elizabeth* (by her name of *Juliana Elizabeth Byron*) and her said father-in-law, entered into a bond, which was hitherto unpaid, insisted on deducting the said sums from the legacy of 2000*l.*

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[\*228]

The plaintiff filed his bill stating these facts, and insisting that these sums were advanced in small sums to his said late wife, before her marriage, for her support and maintenance; and that the bequest to her was intended, and that the same is, in equity, a release of the said debts, the said Admiral *Byron* having expressly assigned as a reason for giving her only the sum of 2000*l.* and not making her one of his residuary legatees with his other daughters, that he had paid and advanced to her considerable sums of money; and that the plaintiff did not know, till after the death of his wife, of the said bonds, or of any debt from her to her father, or to the said *James Sykes*; and that the concealment of the same from the plaintiff by the said Admiral *Byron*, if he intended that the plaintiff should be in any manner liable to the payment of the same, was a fraud on the marriage.

He further charged by his bill, as a proof that the said Admiral meant to make a provision for his said daughter on his death, that, upon his daughter's apprising him of the plaintiff's offer of marriage, the said Admiral wrote a letter to his said daughter, dated about the 18th of *December*, 1782, approving of the same, in which he expressed himself as follows: "How much do I regret, at this moment, the not having " it in my power to do as I could wish on this occasion; you know how " I am circumstanced, but at the same time, if you are in any immediate " want let me know it, and there is nothing I will not do to assist you; " the time will come when you will be much more at your ease." Which letter had been shewn to the plaintiff, with the knowledge of the Admiral, by which means the plaintiff had reason to believe, and did believe, that, upon the death of her said father, the said dame *Juliana Elizabeth Wilmot* would be entitled to some legacy or provision.

The defendant, by his answer, admitted the facts, and submitted to the Court whether the legacy was intended as a release.

[\*] Mr. *Mitford* and Mr. *Sutton*, for the plaintiff, contended that it was clear, upon the construction of the will, that Admiral *Byron* had intended his daughter should have 2000*l.* free from deductions. A will may operate as a discharge of a debt, though it cannot enure as a release. *Elliot v. Davenport*, 1 P. Wms. 83., where a case is cited from *Vernon* (*Gale v. Lindo*, 1 Vern. 475.) which is very strong to this point. The letter makes it manifest he intended some future benefit to his daughter. The letter was intended to be shewn to Sir *Robert Wilmot*. If the Admiral had intended he should be bound to pay the bonds, he would certainly have shewn them to him. The principle of *Neville v. Wilkinson*, (*ante*, vol. i. p. 543.) applies to this: the principle of that case is, that, upon a treaty for marriage, every circumstance shall be fairly stated. In this case she married a gentleman of large fortune, and would have been entitled to a considerable dower. The concealment, therefore, was a gross fraud upon him.

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Mr. *Mansfield*, for the defendants, said, with respect to the 800*l.* he could not contend that there must be a release in order to discharge a debt, but that a will to have that effect must be clear, which he insisted it was not in this case.

He objected to the reading the letter, as nothing could be read to explain a will but a testamentary paper.

But Lord *Chancellor* admitted it to be read, to shew that the debt was given up.

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[ 1829.]

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The counsel for the plaintiff, insisting that the cause ought to be referred to state the transactions, and that an account ought to be taken to ascertain the residue.

Lord Chancellor.—

I do not see what the result of the enquiry will be.

The scope of the words with which he introduces the legacy is an apology for giving her less than he thought the provisions for the other daughters would turn out; I do not lay any great stress on the amount of the residue, because a residue, from its nature, must be always uncertain.

[\*] I will leave the question of the 500*l.* only to the enquiry, and give my opinion now as to the 800*l.* Sir Robert Wilmot's demand goes on two grounds, 1st on the letter, which is treated, not as explaining the will, but as a representation of the Lady's situation; with respect to this, a reference is made to the case of *Neville v. Wilkinson* to shew, what is clearly true, that where, on an original treaty of marriage, there is any fraud or misrepresentation on the subject, it shall bind the parties, as being *contra fidem tabularum nuptialium*. But all those cases imply a treaty, and matters of agreement between the parties. In this case, the lady was abroad; she was the widow of Admiral Byron's eldest son, living upon her own establishment; in this situation, previous to the marriage, Admiral Byron writes her a letter of civility and affection, in which he regrets that he cannot do as he wished on the occasion. But there is no treaty proceeds upon it with Sir Robert Wilmot, nor does it even appear that there was any communication of the letter to Sir Robert Wilmot. Then what was the transaction itself? Before Admiral Byron permitted the transfer of the debt of 800*l.* to his own account, he took from his daughter, then Mrs. Byron, a bond which shewed that he meant to keep up his demand on her for the money. 2dly, Then take it upon the will; he introduces the legacy thus, "whereas I have advanced and paid several considerable sums," &c. It implies to be an apology for giving her less than he intends for his other daughters. But the question is, whether this amounts to a release of the bond. The inclination of one's mind certainly is, that, by these expressions, he did not mean to insist upon the bond. It is argued two ways, that he meant to release it, or that he had forgot it. But his suffering it to remain uncanceled in his possession, shews that he did not mean to give it up. He might easily have shewn his intention so to do, by tearing off the seal. On the other hand, if he had forgot it, there was a total absence of intention with respect to it. A gift of a legacy may certainly be so framed as to be a release of a demand, but it must be clear. But this case can be raised no higher than an absence of intention; and a mere absence of intention can never be construed into a release. My opinion therefore is, that the defendant has a right to have the amount of the bond deducted.(1)

(1) The decree was accordingly, R. L.

(1) because...

1793.

[\*] FITZHERBERT *against* FITZHERBERT.(Reg. Lib. 1792. A. fol. 654. entered *Fitzherbert v. Bateman*.)

ON a bill to establish the will, and for an account of the property of the late Sir *William Fitzherbert*, Bart. one of the witnesses to the will, being abroad in *America*, could not be produced to prove the will; and infants being concerned,

His Honor said, *he could not declare the will well proved without all the witnesses being examined* (1); and that one of them being abroad, there must be a commission to examine him: but he could decree an account without declaring the will well proved.

Mr. *Solicitor General* said, that in the case of *Powel v. Cleaver*, (*ante*, vol. ii. p. 499.) Lord *Thurlow* admitted proof of the handwriting of the absent witness to be read against a feme covert; because she and her husband might have an issue to try the fact: but that it never had been done against infants.

His Honor made a decree for an account, (2) without declaring the will to be well proved.

(1) This prevails equally in depositions, and in a trial at law on an issue *devisavit vel non, if the will is to be established*. See *Ogle v. Cook*, 1 Ves. 177. *Grayson v. Atkinson*, 2 Ves. 454. Suppl. 383, 384, and *Bootle v. Blundell*, Cooper Ch. Ca. 136.

(2) And for enquiries as to what real estate the testator died seized of, &c. &c. and directed the Master to appoint a receiver, who, after paying the interest of any incumbrances, was to pay out of the rents and profits, a rent-charge, and the interest of portions for younger children, &c. &c. &c. The Court reserved "liberty to the parties to examine *W. B.*, one of the witnesses to the said testator's will, or to exhibit interrogatories, and examine witnesses thereon, to prove any circumstances relating to the situation of the said *W. B.*, and the difficulty or impracticability of examining him thereto, and to set down the cause for directions as to the testator's real estate as they should be advised." R. L.

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Master of the Rolls sitting for Lord Chancellor.

4th March.

A decree for an account may be made without declaring the will well proved, where one of the witnesses is abroad.

OXENDEN, Bart. *against* Lord COMPTON.

(Reg. Lib. 1792. B. fol. 243.)

[*Vide* 5. C. 2 Ves. jun. 69.]  
*Lincoln's Inn Hall, March 6.*

A BILL filed by Sir *Henry Oxenden*, Bart. as heir at law of *John Bromfield*, Esq. late a lunatic (now deceased) against Lord *Compton* his personal representative, for the value of timber cut down on the lunatic's real estate, by his sister, the committee, by order of this court.

The bill was filed in consequence of the intimation of Lord *Thurlow*, when the matter was on before upon petition, (see the case *Ex parte Bromfield*, *ante*, vol. iii. p. 510.)

It was argued by Mr. *Mansfield* for the plaintiff, and Mr. *Solicitor General* for the defendant: but the arguments being nearly the same as upon the former occasion, a repetition of them here is unnecessary.

Timber being felled on a lunatic's estate by the committee, by order of the Court, the produce is personal estate of the lunatic. [There is no equity as between his real and personal repre-

sentatives; and] bill by the heir at law for the money, dismissed. (1)

(1) See this case in its first stage, *ante*, 3 vol. 510, &c. and 1 Ves. p. 453. (under the title *Ex parte Bromfield*.) with the Editor's notes; and see the report upon the present occasion, 2 Ves. jun. 69, which is much preferable. *Vide etiam* 1 Fonbl. T. Eq. 60. 421. and *Inwood v. Twine*, 2 Eden, Ca. Lord North, 148, &c. *et postea*, 397 to 403. and the Editor's Notes.

The

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 OXENDEN  
 against  
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[\*] The additional authorities mentioned were *Awdley v. Awdley*, 2 Vern. 192; *Terry v. Terry*, Gilb. R. 11. and *Beverley's case*, 4 Co. 123. b. where it is said, the committee is considered as a mere bailiff, and cannot cut timber except for repairs, (see p. 127. b.)

At the close of the argument, Lord Chancellor gave judgment to the following effect.

This is a bill filed by the heir at law against the personal representative, for the money arising from the sale of the timber.

And the prayer of the bill betrays some doubt as to the act of the Court; for it prays, that the personal representative may account for assets, and if there shall be sufficient to pay the debts, and there shall be so much over as amounts to this sum, that it may be paid to the heir: so that it treats this sum of money as applicable to pay debts, and only desires that if there is more than sufficient for that purpose, it may be paid over.

I cannot discover what equity there is between the heir and personal representative. Both are volunteers. Upon what ground am I to make this conversion of what is now personal estate? If I should retain the bill, I could not give the plaintiff the specific sum he would have had if the timber had remained uncut; because I should give him a benefit that he could not, by any moral probability, have had, if it had not been cut; as he has, in all moral probability, an estate which is the more valuable from the removal of the timber; it being stated that the other timber would be hurt by its remaining: so that he would have not only the estate better by the removal, but he would also have the price of the timber.

But it has been treated as in the course of orders in lunacy. I take the statute of *Edward the Second* not to be introductive of any new right in the crown, but to regulate and restrain the practice of treating the estates of lunatics, in the same manner as those of idiots. The king is *providere*, to make provision for the lunatic and his family; and to account for the residue. The expression *without waste or destruction*, I think must be taken in its ordinary, not its technical sense.

There are cases where cutting timber is not waste, as in the case of tenant in fee.

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[\*] In the case of a lunatic, the application of the estate should be, not only for his sustenance, but for his general benefit. In cases where the estate was in a train of management for that purpose, it would be the duty of a manager to continue that train of management which the lunatic had himself followed whilst sane, or his ancestors before him.

The custody of lunatics is *not in this court, as such: it is vested in the crown*. That branch of the prerogative may be exercised by any officer his majesty thinks fit; it is ordinarily delivered to a great officer of state, who is not necessarily the keeper of the great seal. The committee is, rightly enough, considered as a bailiff, removable by, and accountable to the officer to whom the care of lunatics is entrusted. The warrant conveys no jurisdiction, but only a power of administration. If there is any error or abuse, there is an appeal to the king in council, as appears by precedents.

In the series of orders made in lunacy, there is one prevailing principle, that is, that the sole object in the view of the administrator is the interest of the lunatic; as to the estate, the advantage of the owner, without regard to the interest of the persons who may take it after him. (2)

(a) *Fide (inter alia) Ex parte Baker*, 6 Ves. 8. *Ex parte Fletcher*, *ibid.* 427, 428. *Ex parte Dikes*, 8 Ves. 79. *Ex parte Hastings*, 14 Ves. 182. &c.

If it were otherwise, there would always be an emulation between the persons to succeed, which would very much embarrass the administrator. If the personal estate was the larger part of his property, the next of kin would contend for a strait allowance, to enlarge the personal estate; the heir at law would contend for a larger one; or *vice versa*. The consequence would be a continual balance of solicitations; if an action of trespass was to be brought, the next of kin would oppose the expence being paid; therefore, the administrator only considers the interest of the holder of the estate.

If the succession could be taken notice of, there must be orders to the receiver to keep separate accounts of the real and personal estates; but there never was an instance of an order to the receiver to keep separate accounts. There would be instances of accounts of repairs of the real estate, paid out of the personal estate, which would never pass without opposition. In the case of Mr. *Newport's* lunacy, not an order passed without opposition. [\*] So improvements have been ordered to be made on the real estate out of the personal, without any enquiries as to who would be the personal representative; and the heir, after the death of the lunatic, must be let into the estate, without making any allowance for the improvements, 1 Vern. 262. In collieries, how many questions might arise between the heir at law and the personal representatives, as in the case I put of erecting a fire engine, if it were at a great expence, the next of kin would oppose it; if at a small expence, the heir at law would oppose it.

If those ideas were suffered to float about whilst making these orders, the interest of the lunatic would be committed in favour of those who have no present interest.

What then is the duty of the administrator? To administer the estate *tanquam bonus paterfamilias*, for the benefit of the owner; considering no further than the interest of the present possessor; but always with this guard, that nothing extraordinary is to be done, but what is required by the interest of the proprietor. The payment of debts is an obvious case, in which the funds must be applied as it is best for the owner.

The order made in the present case was perfectly right in itself, it was for the advantage of the lunatic and of the estate. The timber in the state in which it is described ought to be cut. It was a fair fruit of the estate, then mature; instead of being waste and destruction to cut it, it would have been waste and destruction not to have cut it. The Chancellor, on application, would not vary or add to this order. Suppose *Beverley's* case to be right, and that the administrator has only the power of a bailiff. Suppose a bailiff had cut the timber, and it was become part of the personal estate; could the heir, after the death of the lunatic, have any remedy against the personal representative, though he might perhaps maintain an action against the bailiff?

*Ex parte Grimston*, is a case where the personal estate had been applied for the benefit of the real estate. The mortgages had been paid, by order of Lord *Northington*, in the life of the lunatic, out of savings of the real estate. After the death of the lunatic, another mortgage was paid off. Lord *Northington* had ordered it to be for the benefit of the real estate. Upon an [\*] application to Lord *Apsley*, he declared it to be part of the personal estate. There was a petition to rehear this order, which came on before Lord *Apsley*, at his house, assisted by Lord Chief Justice *De Grey* and Mr. Baron *Smythe*. The judges differed; Mr. Baron *Smythe* thought the last order right; Lord Chief Justice *De Grey* thought the heir at law ought to have the benefit of the application of the personal estate in exoneration of the real. Lord *Bathurst* agreed with Lord Chief Justice *De Grey*: the question of jurisdiction

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jurisdiction over the former order was waved. He was of opinion that the power exercised over the estate of the lunatic, existed before the statute. That the estate was to be preserved from destruction; but that the ruling principle is the benefit of the lunatic.† In *Lord Annandale's*

† Lord Chancellor read this case from a MS. note, which his Lordship since most obligingly communicated to the reporter.

Mr. Baron Smythe.

I think the order of July 1771 perfectly right; and that the two orders of Lord Northington, if not manifestly erroneous, are clearly defective.

It is a principle not only as to lunatics, but infants, that no part of their property, during their incapacity, can be changed to the prejudice of the successor. This principle is proved by many cases.

It would not only be of prejudice to legal representatives, but in case of a will before the lunacy, which is not revoked by the lunacy, if the personal estate should, during the lunacy, be diminished, the legatees and even the creditors might suffer.

The case of *Lord Annandale*, in 2 Vesey, 381, is very strong to prove this principle, particularly in that point of the jurisdiction over the money produced by the compelled sale after the lunacy. So *Degge's* case (a) is very strong to prove the principle; and therefore the general rule being very clear; I should consider the deviation from it, in this case, as a mere omission in the order.

The order to pay off the mortgage is not substantially wrong; for the recovery of the lunacy is never desperate; but it is wrong in the consequence deduced from it, as to the successor; the lunatic not having recovered.

The acts of parliament compelling sales proceed on this principle; for there is usually a provision that the money shall remain real estate: where it is omitted, the Court, as in *Lord Annandale's* case, have added it.

An objection has been made, that the chancellor had no jurisdiction to alter the order of his predecessor. That I think of no consequence, for the prerogative is committed from one chancellor to another, and this is properly the act of the crown, by its officer.

It is no objection either, as it seems to me, that the parties are not bound by the bonds, they having been given up; for the duty remains.

Lord Chief Justice De Grey. —

I am under difficulties, for this is a new point, and there are no direct precedents.

The 1st. Question is as to the jurisdiction. —

The precedents seem sufficient to warrant it. But Lord Coke in the 4 Institute, says, the king had not this prerogative when *Magna Charta* passed, nor when *Bracton* wrote; but had it when *Britton* wrote; he cites *Fleta v. The Mirror* for this.

Whether this arose from *Magna Charta*, or from some non-existent statute, the right in the crown existed prior to the statute 17 Ed. 2., and this also appears from the words of the statute, *habet providere*, &c.; and the whole of the statute is calculated to ascertain and define rights in the crown, and not to confer new rights upon the crown,

(a) *Ex parte SIMON DEEGE.*

Mr. *Degge's* estate at *Eccleshall*, in *Staffordshire*, was held of the Bishop of *Lichfield*, by a freehold lease for three lives; and one of these lives dropped in the year 1747, and thereupon the committee of *Degge's* estate, applied by petition to the then Lord Chancellor, and obtained an order dated 15th August 1747, that he should be at liberty to renew the said lease, and to pay the fine and charges of the renewal thereof out of the said lunatic's personal estate; but if the said lunatic should happen to die during his lunacy, then his Lordship did further order, that the remaining interest in the said new lease, after the determination of the two lives then subsisting in the then present lease, should be considered as part of the said lunatic's personal estate, for the benefit of the next of kin.

Pursuant to this order, a new lease was taken, and a new life added to the two surviving lives in the former lease, and the fine and charges thereof were paid out of the lunatic's personal estate, and were allowed to the committee in his account of the lunatic's estate.

Another of the lives in the old lease dropping in the year 1764, an order was, on the 1st of August 1764, made by the then Lord Chancellor, for the renewal of the lease then subsisting, and that the fine and charges thereof should be paid out of the said lunatic's personal estate; and that if the said lunatic should happen to die during his lunacy, the interest in the new lease, during the life then to be added, as well as the new life added in the then present lease, should be considered as part of the lunatic's personal estate for the benefit of his next of kin.

case, [2 Ves. 381.] Lord Hardwicke [\*] considered the produce of the estate in Scotland, as personal estate here; and referred it to the

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Lord Chancellor.

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under, therefore, how Lord Northington's orders stand. The estate is to be preserved from waste and destruction. This is to be understood with great latitude, for the lunatic is the first object; on this ground, the case of repairs stands, the payable interest on mortgages, is also a charge on the estate.

The great principle upon which I have always conceived the court to act, is the interest of the lunatic. In *Morrison's* case, Lord S. was indebted to the lunatic in bonds in England, the committee brought an action against Lord S. in but afterwards prayed the direction of the Court, and its assistance, on a bill made in Scotland as to the right of suing. Lord Hardwicke made a decision as to the order; but, on the ground that it was for the benefit of the lunatic without regard to the succession; for the rights of the succession were preserved by it.

In *Annandale's* case, there was a motion not reported by Vesey; the Scotch, and the next of kin, opposing each other, Lord Hardwicke referred it to the Master of the Rolls whether it was for the benefit of the trust, the money being English trust-money, or whether it was for the benefit of the next of kin, nor whether for the benefit of the lunatic.

In these cases, it strikes me that the Court alters the succession to the personal estate without regard to the interest of the next of kin, if the interest of the lunatic is preserved. If so, why may not the personal estate be taken from the next of kin, if the interest of the lunatic requires it, to favour the heir at law; repairs may be made on buildings, such as barns: if so, why not restore the estate to the condition it was in, by paying off incumbrances?

Why so, but money may be laid out in improvements, if we trust the case of *v. Sealey*, in 2 Atkyns.

In *St. John's Hall*, 5th of May 1779.

Chancellor — gave his opinion upon this rehearing.

He stated the case and the prior orders, and the argument on the rehearing.)

Two learned judges differed in their opinion.

Three points were made for the heirs at law.

That Lord Northington's orders are right.

That there is no jurisdiction, in the great seal, to vary these orders.

His orders, at any rate, must be varied.

The learned judges agreed that I had jurisdiction, and that the order was corrected; therefore the doubt only turns on the first point.

As the question of jurisdiction is of general consequence, I shall say a few words

as I said, that, acting in matters of lunacy under a special authority, the chancellor has power over the estate, except by the bond taken from the committee; and when the lunatic is dead, and the bond given up, the proceedings must be by bill in the Court of Chancery.

If a person is found a lunatic, the king alone can grant the custody of the lunatic a manual, and therefore, to save repeated applications, there always is a sign manual of the Chancellor, on his coming into office.

A warrant is a special authority to make the grant, but extends no farther; and the sign made, the Chancellor then acts, not under the warrant, but as keeper of the conscience, in the exercise of this branch of the prerogative. If the warrant was made to any other officer of state, it would not enable that officer to act after the grant but merely to direct the grant.

Appeals in this matter, and every exercise of prerogative, must be to the king in

no reason nor precedent warrant the position, that the jurisdiction ceases with the death of the lunatic. In the case of *Ex parte Roberts* in Atkyns (3 Atk. 308.) leave had been given to traverse the commission, but Dr. Finney, who had obtained a conveyance of the estate in *Barbadoes* from *Roberts*, agreed to be bound by it.

When the lunatic died, *Finney* refused to be bound; on the 29th of August 1745, Lord Hardwicke, on examination of precedents, granted an attachment against him.

The first question is, Whether Lord Northington's order was right, i. e. Whether the profits of a lunatic's estate may be applied to pay off an incumbrance on the real estate or must be preserved for the benefit of the next of kin.

As I said to be a general rule, that the Court will not alter the lunatic's property, without prejudice of his successor rightly understood. It is true, the Court will not buy land for him, but in the management of the estate, the governing principle is the interest of the lunatic.

Lord

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 [\*237]  
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the Master to settle the proportions for [\*] the lunatic's maintenance, and the payment of his debts, from the two estates, the *Scotch* and the *English*.<sup>(3)</sup> From hence I gather [\*] that the Court varies the interest in the personal estate, without regard to the interest of the next of kin, *Sergeson v. Sealey*, 2 Atk. 412. In all cases, the Court should make such an application as the lunatic himself, if *sane*, would have done.

[\*239]

In *Grimstone's* case the decision was favourable, in the event, to the heir at law; because he was to take the property in the way he found it. It would have been the same with respect to the next of kin, if the change had been for the benefit of the lunatic. 1st. The general rule is, that what is done, be for the benefit of the lunatic; but this is not to be pursued by unnecessary alterations. 2d. That the order being made, and in full force, the persons entitled after the lunatic must take it as they find it, and have no [\*] equity between them. The case of the Marquis of *Annandale* does not seem to apply; I very much doubt the accuracy of Vesey's report: the *dicta* are very loosely taken; the two points determined there do not affect this case; and in fact, the decision most materially varied the succession. The reference was to consider what would be for the interest of the estate. The interest of the lunatic was in that case almost a nullity. There was an heritable jurisdiction, Lord *Annandale*, being under no entail, was entitled to the money paid for it. But it is very clear that Lord *Hardwicke* meant to do what was for Lord *Annandale's* interest. As to the other point, he meant to put it into the usual course of the Court. The case of *Flanagan v. Flanagan* shews that the Court thought there was no equity between the real and personal representative. The sale there was wrong *ultra*, the debts, but at the death of *Flanagan*, what would have been land was money, and Lord *Camden* thought the representatives must take it as they found it.

The consequence is, this bill must be

Dismissed. (4)

Lord *Macclesfield* lays it down properly in *Dormer's* case (2 Wms. 262): there 200*l.* *per annum*, was applied to keep down the debts.

It is frequent to order repairs out of rents and profits. If the mortgagee should enter, the rents and profits would be applied to the principal as well as to the interest, and therefore why should not the Court order this application.

Rents and profits are the fruits of the real estate, they differ very much from other personal estate; and it would be too hard upon the heir, to impoverish the real, for the benefit of the personal estate.

The case of infants is different; for an infant has a personal interest to increase the personal fund, which is sooner subject to his disposition than the real estate; and yet, even in the case of infants, the court will order repairs to be made out of the rents and profits.

Upon the best reflection, I think my order was mistaken; and that Lord *Northington's* order ought to stand.

(3) See the notes in the Editor's edition of Ves. sen. (4th) 2 vol. 381., and the Suppl. to Ves. 365, 366.

(4) Without costs. R. L.

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[NOURSE *against* FINCH.]HORNSBY *against* FINCH.

(No Entry.)

SIR CHARLES NOURSE, of Oxford, made his will, 18th of February, 1789, by which, after providing for his funeral, &c., As to his worldly estate with which it had pleased God to endow him, he gave as follows, (*inter alia*) to the defendant Elizabeth Finch, the house wherein he then dwelt, and another house in fee, provided she did not marry but continued single, and in case she should marry, then the devise to become null and void; he gave to her his household furniture, &c. on the same condition, and also gave to trustees 15,000*l.* 3 per cent. reduced annuities, in trust, to permit the defendant to take the interest for life, provided she remains single, and from and after her decease or marriage, then he gave the same over. Then, after several other legacies, he gave to the defendant, the sum of 1100*l.*, secured to him on the Oxford Market, to dispose of as she should think fit; he then gave to trustees, a sum of 2500*l.* to permit the defendant to receive the interest for life, provided she did not [\*] marry; he gave to trustees 4000*l.* reduced annuities to permit his sister (the original plaintiff) to receive the interest thereof for life, with remainders over; he also gave to Richard Finch 8000*l.* secured on the Oxford Canal; and 1300*l.* stock in the said canal, on condition that he should surrender his right and title to certain copyholds of the testator, to the use of the defendant in fee, and after several other devises and bequests to a very great amount, (but without making any disposition of the residue) he appointed the defendant sole executrix of his will.

The testator died about the 19th of April, 1789, leaving (the original plaintiff) his sister his sole next of kin, and the defendant his executrix surviving him; the latter proved the will, and possessed herself of his personal estate.

The original plaintiff filed the present bill, claiming the residue as next of kin: and to shew that it was not the testator's intention to give the same to his executrix by that description, she stated, that the testator about a month before his death brought his will ready prepared, to Thomas Walker Esq., at Woodstock, and desired he would peruse it and see whether it was properly drawn, when he observed to the testator, that as he had disposed of a very large property, it might perhaps exhaust his whole fortune, but if there should be a surplus, he had not made any disposition thereof by the will; to which the testator replied, that he had not disposed of his fortune by 7 or 8000*l.*, but intended to give that by a codicil in his own hand-writing, and desired he would draw the form of a codicil with blanks, and send it to him by the post to Oxford; and upon opening the will, the sketch of a codicil, which had been sent, was found therein, but not executed by him.

The defendant, by her answer, insisted upon her claim to the residue as executrix; and said she believed she should be able to prove that the testator did not intend it should result to the next of kin, but on

[Vide S. C.  
1 Ves. jun. 544.  
and 2 Ves. jun.  
78.]

3d June, 1791.

Mr. J. Buller,  
sitting for  
Lord Chan-  
cellor.

23d July, 1791,  
Lord Chan-  
cellor Thurlow.

5th and 8th  
March, 1793,  
before the Lord  
Chancellor  
Loughborough.

Testator gives  
to defendant  
several benefits  
in case she  
continues un-  
married; but  
gives her a sum  
of money  
secured on a  
market abso-  
lutely, and ap-  
points her exe-  
cutrix: the  
residue undis-  
posed of, shall  
go to the next  
of kin (1); the  
parol evidence,  
as to the in-  
tention of  
testator being  
doubtful. (2)

[\*240]

(1) See *Martin v. Rebou*, ante, 1 vol. 154., and the Editor's notes, *Bowker v. Hunter*, ibid. 328, &c. &c.

(2) See in *Clenell v. Leuthwaite*, 2 Ves. jun. 471, &c. per Lord Thurlow C. in *Ellison v. Cookson*, ante, 3 vol. 63, &c. &c.

the

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[ \*241 ]

the contrary, that he believed it would belong to her; his sister having a very ample provision for her life, and the defendant having attended the testator in his infirmities, and she and her family having been always considered by him with great affection, and said, she had been informed that the (original) plaintiff understood from the testator, that [\*] she was not to receive any more of his property than was particularly given to her.

The cause was heard on the 3d of June, 1791, before Mr. Justice Buller, sitting for Lord Chancellor.

It was agreed by the counsel on both sides, that this was a question to be decided by parol evidence, which was accordingly read.

On the part of the plaintiff, it was to the following effect:

*John Walker* (an attorney at *Oxford*) swore that he was applied to by the testator, to prepare his will, which he accordingly did, and that the testator being at his house, and discoursing on the subject of his will, the witness reminded him, that he *had not disposed of the residue* of his property, to which the testator replied, that he meant to dispose of it by a *codicil of his own making*.

*Thomas Walker*, brother of the last witness, stated a conversation on the subject of the will, (at the time it was submitted to his approbation) in which the testator said, he had 7 or 8000*l.* more to dispose of, which he meant to give away by a codicil in his own hand-writing, and wished the witness would give him the outlines of one, which he did (and which was the same as was found with the will).

For the defendant, *Richard Finch* (her brother) spoke of great intimacy with the testator, and of his speaking in general favourably of the defendant: and with respect to the (original) plaintiff, he said that he (had being so authorised by the testator) offered her 2000*l.*, 3000*l.*, or 4000*l.*, or any sum that would make her perfectly easy; that she replied, her income was already more than she could spend, as she never intended to alter her mode of living, and that any addition to her property would only be a trouble: that the testator informed him, (the witness) he had been to Mr. *Thomas Walker*, at *Woodstock*, for the purpose of knowing to whom the residue of his effects would go in case the same were not disposed of by him, and had been informed by him, it would go to his executrix, whom the testator informed the witness, was his (the witness's) sister.

[ \*242 ]

[\*] The Rev. *Herbert Croft* spoke to his intimacy with the testator, and his kind expressions as to the defendant, who he said should not have less than 30,000*l.*, and that he said to the witness, that though she would have the residue, yet she would not have so much as she deserved: (this conversation was after the making of the will:) That the testator had often expressed anxiety lest any unworthy person should marry the defendant, for the sake of her property; and consulted the defendant how it might be possible to conceal the amount of the property she would acquire by his will; that the witness informed him, the best way would be that the will should be so made, as that she should be entitled to the residue, which advice the testator approved; that in *March* previous to the testator's death, he (the witness) received a letter from the testator, in which he informed him, that he had settled his affairs in the way the witness advised, but he thought he had not done enough for Miss *Finch* (the defendant), but that the witness, having destroyed the letter, could not recollect whether the expressions used by the defendant were "I have followed your advice, and have taken all the care I could that Miss *Finch* should have the residue, and not be made a prey of," or "I have followed your advice, and taken all the care I could that Miss *Finch* should not become a prey;" but, to the best of his recollection, the testator used the former expression:

The

The witness stated several conversations, in which the testator, upon the witness reminding him of his advice, told the witness that he should not forget to follow it; and that he had frequently expressed uneasiness, from doubts whether the defendant would be entitled to the residue, which *he always intended*, for reasons the witness knew, that he afterwards said, he felt himself happy that his will was made as he intended, and every thing personal undisposed of would go to Miss *Finch*, without any person being able to calculate the amount.

*Richard Finch* and *Dr. Chapman* were present when the will was opened, and observing the residue was undisposed of, the latter asked the witness *Thomas Walker*, who was also present, to whom the residue would go, to which he answered, to Miss *Finch* as executrix, except the freehold, which would go to the heir at law.

This was contradicted by *Thomas Walker* on his cross examination, who said, that he did not at that time intimate any opinion on the subject.

[\*] *Mr. Mansfield*, *Mr. Graham*, and *Mr. Abbot*, for the plaintiff, commented on this evidence, and contended that the gift of the eleven hundred pounds, being a gift out and out, brought this case within that of *Middleton v. Spicer*, (*ante*, vol. i. p. 201.) and that the making a codicil without appointing a residuary legatee, was similar to that of *The Bishop of Cloyne v. Young*, 2 Vesey, 91.

[ \*243 ]

*Mr. Solicitor General (Scott)*, *Mr. Richards*, and *Mr. Alexander*, for the defendant, contended that the result of the evidence shewed the intention of the testator to be, that the defendant should take the residue as executrix. They treated the legacy as being specific, and relied on the distinction taken in *Bowker v. Hunter*, (*ante*, vol. i. p. 328.) as referring to *Southcote v. Watson*, 3 Atk. 226. and relied particularly on *Lawson v. Lawson*, in the House of Lords, 7 Bro. Parl. Cas. 511. They also cited *Brassbridge v. Woodroffe*, 2 Atk. 68. where there was enough to shew that the testatrix intended that the next of kin should not take, and that gave the residue to the executors, though not disposed of by the will.

*Mr. Justice Buller* stated the will, and spoke as follows,

If the case was confined to the will itself, it is impossible to doubt, after various decisions on the subject, that the residue will go to the next of kin, as a resulting trust, and not belong to the executrix. The different provisions which are made for Miss *Finch*, some for life only, some in fee, on condition she did not marry, and one absolutely and without any condition, out of the personal estate, afford a violent presumption, that the testator, at the time he made his will, intended nothing more for her than he had expressly or specifically given to her.

But besides the convincing reasons which arise on the face of the will itself, the point is so fully settled by different decisions, that it would be shaking first principles to make a doubt about it.

So long ago as 1709, it was considered as a rule in equity, that if part of the personal estate was expressly given to the executor, the surplus should be taken from him and distributed among the next of kin.

[\*] And in *Mackworth v. Llewellyn*, in 1734, the rule is stated to be, that where a legacy is plainly and simply given and taken out of the residue, there it is an exclusion of the residue.

[ \*244 ]

This rule was expressly recognised in the House of Lords, in *Lawson v. Lawson*; though on the particular penning of the will, in that case, the residue was decreed to the executrix.

Here the 1100*l.* given to the defendant is a legacy plainly and simply given, and taken out of the residue.

This being the true construction of the will, taken by itself, three other questions arise on it.

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1st, Whether the parol evidence ought to be received, to alter the sense of it, and to give it another construction?

2d, If any parol evidence could be received, within what limits it ought to be confined?

And 3dly, What is the effect of the parol evidence when received?

As to the first; if this were a new question, I should be clearly of opinion to reject the evidence *in toto*, for I think it is mischievous, and inconvenient. Words easily receive a colour. But sitting here only for an hour or two, or a day or two, I do not feel myself strong enough to overturn what has been done in a number of cases: though I must say, if the cause turned upon this point, I should find great difficulty in bringing my mind to say, that the cases in favour of the evidence ought to be adhered to.

I agree that in the case of an *ambiguitas latens*, parol evidence is to be received, as to the identity of the thing given, or of the person to whom it is given; so also in cases of fraud, and perhaps of ignorance or mistake, such evidence may be given. But it by no means follows, that it should be allowed to prove the intention of a man in any written paper, where that ought to be collected from the paper itself.

[ \*245 ]

[\*] The manner in which such evidence has crept into use, in this court, seems pretty plain from resorting to the older cases on the subject, and there seems to me to have been a considerable mistake in some of them.

Until the case of *Foster v. Munt*, 1687, (1 Vern. 473.) the executor took all: no implication was raised, or reasoned upon in favour of the next of kin. There 10*l.* a-piece was given to the executors *for their care*, and the residue undisposed of, was 5000*l.* which was decreed to the next of kin. But that case by no means warrants the admission of parol evidence to prove the intention of the testator. Lord Chancellor *Jefferies* referred it to the Master only to see what the surplus was; and to ascertain that, parol evidence undoubtedly was proper.

As that case was quoted by Lord *Mansfield* in *Lawson v. Lawson*, in the House of Lords, it appeared that the executor himself, who was an attorney, made the will; and he having given himself 10*l.* *for his care*, and the residue being 5000*l.* that was considered as a gross imposition.

As a case of fraud there was no objection to parol evidence: but still that does not warrant it in the case of mere intention.

Lord *Bacon*, in his *Maxims*, says an averment shall not be of intention; it must be of matter that doth endure quantity, and not intention.

So the Law most clearly is; and it would require very pointed and numerous authorities, and very powerful reasons to induce one to say, that the rule ought to be otherwise in Equity.

[ \*246 ]

The progressive steps which the court of Equity has taken, seem to be, 1st, to have admitted such evidence in cases of fraud; 2d, to have applied the cases on fraud to other cases where there was no fraud; 3dly, because they were determining against the known law of the land, that they would admit evidence partially, in order that there might be no reason for supposing they were not right in the intention they ascribed to the testator; and lastly, having admitted evidence in favour of the executor, they found themselves obliged by the plain [\*] rules of equal justice, to admit evidence on the other side also: and so, by degrees, they got the length of explaining away a written will by loose vague parol testimony. Since that they seem to have repented, in a great degree, of what they had done.

In *Lady Gainsborough's* case, 1691, (2 Vern. 252.) the bill proceeded on the ground of ill design, or ignorance in the person who drew the will, and the Court over-ruled a demurrer, relying on the cases of *Crompton v. North*, and *Pring v. Pring*, 2 Vern. 99.

But

But in *Crompton v. North*, as that is printed, no parol evidence was admitted, and in *Pring v. Pring* the executors were expressly made so in trust, and 20*l.* a-piece given them for a remembrance, above their costs and charges. The only question there was, as to the person for whom the trust was intended, and that being confessed by the answer, and proved to have been declared by the testator, to be his wife, the surplus was decreed to her. The wife was not the next of kin. That case did not go on an implied trust, but on an express trust declared and confessed.

The case of *Lady Gainsborough* only goes to show that parol evidence may be to prove ignorance or ill design in the person who drew the will; but, in our case, no such thing is suggested.

The same observation holds as to the case of the *Duchess of Beaufort* (2 Vern. 648. 1 Wms. 114.,) where the evidence given was, to prove that the testator had given instructions to dispose of the residue, which the attorney had neglected to do.

No case which I can find, except the case of the *Duchess of Rutland* (2 Wms. 209.,) goes the length of the present, in which it is not pretended that any mistake or omission has been made by any other person, or that the will is not exactly as the testator intended at the time that he executed it: but the evidence is offered, merely to show what was the intention and meaning of the testator, either in using the words which are found in his will, or at other times.

Therefore, I feel a very strong inclination to reject the evidence *in toto*: and think I should be justified in doing it, by [\*] the cases of *Brown v. Selwin*, Forr. 240., and *Blinkhorn v. Feast*, 2 Ves. 27.

In the case of *Brown v. Selwin*, there was an express bequest of the residue to the executors, one of whom was indebted to the testator in 3000*l.* on bond, and evidence was given to show that the testator intended to release it to the obligor, and had given instructions for that purpose, to the attorney who drew the will. Lord Talbot said, "he privately thought that it was intended that the 3000*l.* should go to Mr. Selwin, but he was not at liberty, by private opinion, to make a construction against the plain words of a will." The House of Lords would not allow the parol evidence to be read.

And in *Blinkhorn v. Feast*, Lord Hardwicke said, "there might have been another question on the parol evidence, and it is certain it has been read to rebut an equity arising from a resulting trust. But since *Brown v. Selwin*, I have been extremely tender in admitting evidence in questions of this kind; though I never doubted it where it was to ascertain identity, or in case of collateral satisfaction, where there was a legacy by a father, and afterwards a portion given."

But as the evidence has been read, I will proceed to examine what it is; which brings me to the 2d question, (viz.) If any parol evidence is to be received, within what bounds is it to be confined?

The evidence which has been read, is of conversations with the testator, before the making of the will, at the time of making it, and after it was made.

But as to all the evidence, except what passed at the time of making the will, the case of the Duke and Duchess of *Rutland*, in which the decree was founded on the parol evidence, is a direct authority against it, for Lord Macclesfield said, "After all, I own the allowing parol evidence is exceedingly dangerous, and not to be done in cases of discourse at different times, from that of making the will:" and yet abstractedly from that case, parol evidence has been admitted.

[\*] If this rule be adopted, the case then becomes extremely clear on the part of the plaintiff, for then no evidence ought to be read but *John Walker's*, who proves, that, at the time the will was made, the

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Notum  
against  
Fitch.

[\*247]

[\*248]



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Nourse  
against  
Finch.

testator was so far from intending the surplus for the executrix, that he knew he had not disposed of it by his will, and intended to do it by a codicil. That was the moment for the residuary legatee, if intended.

But lastly, I will suppose that all the evidence is admissible, and has been properly read and examined, What is the effect of it?

(Mr. Justice *Buller* here recapitulated the evidence and continued.)

If the evidence be doubtful only, or if it be contradictory, it must be laid aside; and so it was held by *Holt*, Chief Justice, in *Petit v. Smith*, 1 Wms. 7. who said *such proofs ought to be plain and indisputable, to entitle an executor to the benefit of the surplus.*

And in the Duchess of *Beaufort's* case, where the proof was all on one side, and seemed to have great weight, if believed, Lord *Cowper* laid it wholly out of the case, he says, "the proof of what *Price* (who drew the will) said in his life-time, is evidence, but the slenderest sort of evidence; another witness speaks less uncertainly, that she should have it as executrix, or to that effect; and a third, that the Duke gave directions, that the Duchess should have the estate to dispose of as executrix." It is true the House of Lords admitted this evidence, and reversed the decree; which there seems to be great reason for, if the evidence ought to be admitted at all. But still that case shows, that the Court expects clear and consistent evidence; and I think I may say, uncontradicted testimony, before they proceed upon it.

Again, if the weight of the whole evidence be considered, what has been read on the part of the defendant is not to be put in competition with what has been produced by the plaintiff.

[ \*249 ]

The conversations with the two *Walkers* were held with his *men of business*, whom he consulted as to what he had to give [\*] to whom he would give it, and the manner in which he would give it; all these conversations wore with the express view, and for the purpose of making and preparing his will and codicil. They prove that the testator did not mean, at the time he executed the will, that the residue should pass by it, but he intended to dispose of it, by a codicil, which codicil was drawn, but never executed. And if, at the making the will, the intent appears, that the executrix should not take the beneficial interest in the surplus, no accident afterwards can give it to her. So it was laid down by Lord *Hardwicke* in the case of the Bishop of *Cloyne v. Young*, 2 Vesey, 91.

This, instead of being contradicted, is in a great measure confirmed by *Finch*, for he says, two days after the will, the testator said *he had a residue not disposed of*, and that, at a subsequent time, the testator was anxious to know, *not to whom he had given the residue*, but to whom it would go, if he did not dispose of it. But then he says the testator was satisfied by *Walker*, it would go to the executrix.

This is contradicted by *Walker*, and therefore must be laid out of the case; but if it be admitted, it only proves what was his intention after making the will, not at the time of making it.

The evidence of Mr. *Croft*, when considered, goes no further; for it shows that the testator, so far from thinking that he had actually given the surplus by his will, had great doubts what would become of such parts of his property, as *he had not disposed of*. But after he had made his will, he had been told the residue would go to Miss *Finch*, which he always intended; that he did not always intend it is pretty clear from the codicil, which was drawn by his direction.

But conversations held with a friend of his, and of the executrix, at different periods, are not to be put in competition with expressions and declarations made in the hour of deliberation, with his *men of business*, whom he employed in the very act of disposing of his property.

There are also contradictions as to what was said by *Walker* when the will

will was opened; but whatever happened at that period, is too immaterial to deserve any observation.

[\*] Decree for an account, and declare the plaintiff as sole next of kin is entitled to the clear residuc, or surplus, of the personal estate not expressly disposed of by the will.

The defendant in this cause, presented a petition of rehearing to the late Lord Chancellor, by whom it was reheard, 28 July, 1791, but no judgment was given.

In April, 1792, the plaintiff died, having made her will, and appointed the reverend Dr. *Hornsby* and others her executors, who revived the suit which was set down before the late Lords Commissioners, but never heard by them; on the 5th and 6th of this month, it came on to be reheard, before the present Lord Chancellor.

The arguments and cases cited, were much to the same purport as before; the case of Lord *North v. Purdon*, 2 Vesey, 495. alone was added, and some observations made upon the evidence, the repetition of which is rendered unnecessary by its having been so fully considered by Mr. Justice *Buller*, and after the argument, this day, (8th March,)

Lord Chancellor gave judgment to the following effect.

I have no doubt in this case, as I think the decree is perfectly right; and as I fully concur with Mr. Justice *Buller*, I shall be the shorter in giving my reasons. —

There are two questions, 1st. It is contended, that here is sufficient, on the face of the will, to rebut the equity in favour of the next of kin; and supposing it to be so, the parol evidence seems perfectly unnecessary.

This question has been much agitated for above a century.

It is impossible that any man who has had any experience in this Court, should not have a bias in favour of one or other of the different opinions which have been entertained on this subject. I acknowledge I have a precedent tendency in favour of the executor.

It is much to be wished some one positive rule had been adopted. I have often thought, that determining on the particular [\*] circumstances of each case was very inconvenient, and if any rule had been laid down, it would have been more convenient.

If that rule was, that the executor should take all the residue, except where it was expressly given away, though it would have pressed itself upon the judge, sometimes, as severe, it would have been no general inconvenience: the law being known, testators would have seen that it was necessary to dispose of the residue, if they did not mean the executor to take it. Or if it had been considered otherwise, that the appointment of an executor was an appointment to an office only, and that a testator giving a part could not mean to give the whole, that might have answered the purpose as well: but there have, in the determinations, been distinctions heaped upon distinctions.

The rule in the case of *Lawson v. Lawson*, is a good one to steer by, that a legacy will take away the residue, and that to take it out of the rule, the legacy must be so qualified, as to shew that it is not inconsistent with the executor's taking the residue.

If I were to rest on the circumstances of this case, I think they shew that the testator did not mean the executrix to take the residue. The interests given to her, are all, except one, given over on her marriage; in the midst of these there is one legacy of 1100*l.* which she may dispose of: his anxiety was, that she should be kept in a state of celibacy: though provided for, in other respects, most amply; but he was afraid of her being made a prey of; he could not mean to throw out a temptation to marry her by a large residue. I should, therefore, have no

1793.

NOUVEAU  
against  
FINCH.

[ \*250 ]

[ \*251 ]

1793.

Nourse  
against  
Finch.

[ \*252 ]

difficulty in declaring that the particular legacy shewed it could not be his intention that she should take the residue.

I cannot help regretting that the determinations have led to the introduction of parol evidence; here the parol evidence all arises from the recollection of conversations, and is collected more from the substance of what other persons said to the testator, than from what he said himself: part of *Herbert Croft's* evidence is only a recollection of an answer to a letter, which are both lost, that the testator used one expression or another, perfectly different in meaning, he does not know which was used, but from his habits of thinking, is led to believe it was one. The [\*] admission of such evidence, is exposing the will of a testator to the explanation of every body who ever conversed with him. But here *res ipsa loquitur* that he had no such intention; the codicil was found unexecuted with the will, beginning with the words "whereas I have not in my will disposed of the residue:" *John Walker* says that when he returned the draught of the will, drawn from the instructions, he observed the residue was not disposed of; the testator's answer was "I mean to dispose of it by a codicil of my own making." The testator directed him to send it him to his brother *Thomas*; at the time of the execution, *John Walker* reminded him again of the residue not being disposed of. The testator goes to *Thomas Walker* who observes, as so much was disposed of, perhaps there was no residue. The testator replied that there was a residue, but he meant to dispose of it by a codicil. *Thomas Walker* reminds him of the county hospital. *Thomas Walker* afterwards draws a codicil, beginning with the declaration, that there was somewhat undisposed of: this was the codicil found unexecuted with the will, and it being found so, it gives a consistence to the whole matter. *Finch's* evidence is as strong for the plaintiff as the *Walkers*. It appears, from the whole, that he had a residue, and he wished to know how it would go; that he wished to establish a charity for decayed tradesmen, that *Thomas Walker* had satisfied him as to the residue. So he had; he had furnished him with the means of disposing of it, in two minutes, by filling up the blanks in the codicil. Dr. *Chapman's* evidence only takes up a scrap of a conversation. The whole tenor of the testator's conduct shews his intention. The highest to which it can be raised is that Sir *Charles Nourse* had great doubts about his residue; and that he had a great degree of favour, encreasing towards the last, to Miss *Finch*; but that he had a varying unsettled intention, with respect to it; that he had no intention, when he made his will, to dispose of the residue; he then thought there was more to do. The decree must be

Affirmed.

[ \*253 ]

[Fide S. C.  
2 Ves. jun. 24.]

*Lincoln's Inn  
Hall, 11th  
March.*

Plea, where  
one part is in-  
consistent with  
the other,  
over-ruled. (1)

[\*] NOBKISSEN against HASTINGS.

(Reg. Lib. 1792. B. fol. 243.)

THE bill stated, that the defendant was, in the year 1780, under the appointment of the *East India Company*, Governor of *Fort Saint William*, and applied to the plaintiff by *Caunto Baboo* his agent, for a loan of 30,000 (2) sicca rupees, amounting to 37,500*l.* sterling, at the

(1) Fide Mr. Beamie's Observations on this case in his Elem. Pleas in Eq. pp. 29, 30.  
(2) "300,000 sicca rupees." Lord Redesdale's MS. correction.

usual rate of interest there, to be secured by bond; to which the plaintiff assented, on condition of having the bond executed and delivered into the possession of *Caunto Baboo*, to remain with him till the money was paid by the plaintiff, when the plaintiff was to be at liberty to take the same into his possession, and to enforce the same against the defendant, if necessary; and the defendant did make and execute the bond, and delivered the same into the possession of *Caunto Baboo*; and that the plaintiff paid the money by installments; and that, after payment thereof, he applied to *Caunto Baboo* to deliver up the bond, who informed him that he had delivered up the bond to the defendant, who had destroyed the same, or had it now in his custody: and the bill interrogated to the facts of the appointment as governor, and of the loan, and prayed a discovery of the several matters, and that the defendant might be decreed to deliver up the bond to the plaintiff.

To this bill the defendant put in a plea in bar: and as to all the matters of the discovery required by the bill, pleaded that, by the act of the thirteenth of the present king, it was enacted, "that no governor general, or any of the council should accept or take, from any person or persons, any present, gift, donation, gratuity or reward, and it was further enacted that if any governor general, &c. should commit any offence against the act, all such crimes, offences, &c. might be enquired of, tried and determined in his majesty's Court of King's Bench, and the persons so offending, on conviction, should be liable to such fine or corporal punishment as the Court should think fit, and should be adjudged incapable of serving the Company in any office, &c." And the defendant, for plea, further said, that articles of impeachment had been exhibited against him, charging him with great extortion, under pretence of receiving presents, and particularly, that he had first solicited as a loan, and afterwards corruptly taken as a present [\*] from (the plaintiff) *Rajah Nobkissen*, a sum amounting to 34,000*l.* (which he averred to be the same transaction, and with the same person,) and that if any such matters were done between the defendant and the plaintiff, as by the bill were supposed, the discovery of such matters might subject the defendant to the pains and penalties of the said act of parliament, and also to the pains and penalties of such impeachment, and that the answer of the defendant, if he should admit himself to have done the acts charged, might be received and read against him in any prosecution under the act, and upon the trial of the impeachment.

This plea came on now to be argued, when

Mr. *Attorney General* stating the interrogatories in the bill and the plea,

Lord *Chancellor* objected to it as being double.

Mr. *Attorney General* answered, that a plea differs from a demurrer in this, that a plea may be good in part and bad in part.

Lord *Chancellor* allowed the distinction; but said, that the two parts of this plea were inconsistent. It first stated, that the discovery would render the defendant liable to a prosecution in the Court of King's Bench. Secondly, that it would be evidence upon the impeachment, which was inconsistent with the former; that, therefore, one part of the plea would over-rule the other: and that it struck him, that the Court would not allow a double plea, much less one that was inconsistent:

But gave the defendant leave to withdraw his plea and demurrer.

1793.

Nobkissen  
against  
Hastings.

[ \*254 ]

1793.

[Vide S. C.  
2 Ves. jun. 83.]

Lincoln's Inn  
Hall, 11th  
March.

A speaking demurrer overruled. (1)  
Demurrer to a bill for redemption, because defendant had been in possession twenty years (2), overruled; the fact not appearing on the face of the bill, but by averment in the demurrer.

[ \*255 ]

## EDSELL against BUCHANNAN.

(No Entry.)

A Bill to redeem a mortgage. It stated that *John Edsell*, the plaintiff's uncle, mortgaged the premises in question, in the year 1756, to *George Lucas*, and continued in possession thereof [\*] till his death in 1759. That, upon his death, the plaintiff's father, *Thomas Edsell*, entered into possession, as heir at law, and continued in the same till his death in 1770, upon which the equity of redemption descended to the plaintiff, as his eldest son and heir, and that the mortgage had become vested in the defendant, and soon after the death of *Thomas Edsell*, the defendant took possession, and had ever since been in possession and in receipt of the rents and profits, and had received therefrom more than sufficient to pay the principal and interest due on the mortgage.

To this bill the defendant demurred, and for cause of demurrer shewed, that, upon the face of the bill, it appeared that from the year 1770, which is upwards of twenty years before the filing the bill, the defendant had been in possession of the premises, and that the equity of redemption had all along belonged to the plaintiff, who is not pretended to have been under any incapacity or disability to have a right of entry saved within the clauses of the statute of the 21st of *James I.*, and that the plaintiff had not stated any thing to shew he had a right of redemption.

*Mr. Attorney General* and *Mr. Hall* (in support of the demurrer) argued, that it was now a settled rule, that where a mortgagee had been twenty years in possession, and it appeared so by the bill, a redemption should not be decreed. The second question was, whether it should be insisted upon by a demurrer or a plea? That when the fact appeared on the face of the plaintiff's bill, a demurrer was the proper way; where an averment of the fact was necessary, there it must be by plea. Both points are determined by the note on *Cook v. Arnham*, 3 P. Wms. 287. *Frazer v. Moore*, Bunb. 54.; and lately, in a case at the Cockpit, of *Beckford v. Close* (3), (cited ante, vol. 3. p. 644.) It is true, that in *Aggas v. Pickerell*, 3 Atk. 225. Lord *Hardwicke* had doubts whether it could be done by way of demurrer; but the decisions since have established the doctrine.

*Mr. Richards* (on the other side) contended, that the length of time could not be insisted on by way of demurrer: if an action was brought, it must be taken benefit of by plea; it could not be objected at the hearing. In *Aggas v. Pickerell*, the matter was very much considered. Lord *Hardwicke* said, "he was of a different [\*] opinion, where it "was insisted on by way of demurrer: for how is it possible to give "greater allowance to length of time than the statute of limitations "does? If a bill is brought to redeem, and the plaintiff sets forth that "he has been long out of possession, and does not shew himself to "be within any of the exceptions of the statute, you cannot take ad-

[ \*256 ]

(1) See per Lord *Hardwicke* C. in *Brownwood v. Edwards*, 2 Ves. 245., and the report 2 Ves. jun. 83.

(2) If this fact had appeared upon the face of the bill it would have sustained a demurrer. See *Hadle v. Healey*, 1 Ves. & Beam. 536., *Foster v. Hodgson*, 19 Ves. 180., *Barron v. Martin*, *ibid.* 327. and *Coop. Ca. Ch.* 189., and the Editor's note (1) to *Earl of Deloraine v. Browne*, ante, 3 vol. 633.

(3) Stated 1 Ves. 475., 2 Scho. & Lefroy, 637, 638., and 19 Ves. 184. See also the Editor's note (1) to *Earl of Deloraine v. Browne*, ante, 3 vol. 633.

" vantage

"vantage of that by demurrer; for the plaintiff may make it appear, by way of reply, or by amending his bill, he is within the savings of the statute; or, upon a plea, he may prove himself to be within the exceptions; but if it was to be allowed upon demurrer, the bill would be out of court, and that, I think, is carrying it too far."

Lord Chancellor said, the language of the demurrer was not sufficiently correct to shew the possession out of the plaintiff for twenty years; that the bill stated that the ancestor died in 1770, and that *soon after* the defendant took possession. I cannot draw, from thence, that he took possession in 1770: so that it does not appear upon the face of the bill, but by the averment in the demurrer. There are many cases in which there has been a redemption after twenty years; as where it appears that the mortgagee has treated it as a mortgage, as by keeping accounts.

Demurrer over-ruled.

1793.

EDSKILL  
against  
BUCHANAN.

COPELAND *against* WHEELER.

(Reg. Lib. 1792. A. fol. 171. b.)

Lincoln's Inn  
Hall, 16th  
March.

**E**XCEPTIONS to an infant's answer had been shewn for cause.

Mr. *Solicitor General* (for the plaintiff) admitted that exceptions will not lie to an infant's answer, and proceeded to shew cause on the merits.

Exceptions  
will not lie to  
an infant's  
answer. (1)

On this subject see the following case, *Strudwick v. Pargiter*, Bunb. 338., which cites *Gibson v. Coleman*, before Lord Talbot.

(1) See 1 Ball & Beatt. 553., *Lucas v. Lucas*, 15 Ves. 274., and the last edition (5d) of Lord Redesdale's Treatise, 254.

[\*] HERCY *against* DINWOODY.

[ \*257 ]

*By Bill of Revivor and Supplement,*

LOVELACE HERCY, Administrator *de bonis non* of the Testator *William Hercy*, and also a Creditor of said WILLIAM HERCY, his Father - - - - - Plaintiff.

AND

WILLIAM DINWOODY and WILLIAM HALLIDAY, surviving Executors of *John Shipway*, who was Executor of *John Bance*, the Executor of the Testator *William Hercy*, JOHN COX and ELIZABETH his Wife, and JAMES MATTHEWS; which said *Elizabeth Cox* and *James Matthews* are the Executors of *Richard Matthews*, the Defendant in the former Cause, and against whom an Account is directed;

MARY

1793.

MARY MARSHALL, one of the Daughters of the Testator, and Legatee under his Will;

THOMAS HERCY SMALLWOOD, Administrator of *Henry Smallwood*, who was Husband of *Rebecca Hercy*, another of the Daughters and Legatees, and who survived his said Wife;

MARY MATTHEWS, Heir at Law and Executrix of the said late Defendant *Mary Matthews*, one of the Trustees in the said Testator's Will, - - - Defendants.

*And, by Bill of Revivor,*

The said LOVELACE HERCY, Heir-at-Law of the above-named *Mary Matthews* - - - Plaintiff.

AND

ALL THE BEFORE-NAMED PARTIES - - - Defendants.

(Reg. Lib. 1792. A. fol. 317.)

[ *Vide S. C.*  
2 Ves. jun. 87.]

*Master of the  
Rolls for Lord  
Chancellor.*

*Lincoln's Inn  
Hall, 18th  
March.*

Where a party  
has lain by for  
a great length  
of time, and  
suffered an  
estate to be  
distributed, he  
shall not have  
an account. (1)

[ \*258 ]

THIS bill of revivor and supplement prayed that the decree therein mentioned might be further carried into [\*] execution, and that the plaintiff and other creditors of *William Hercy* might have the benefit thereof, and that the accounts prayed against *John Shipway*, might be directed to be carried on against the defendants *Dinwoody* and *Halliday* his executors, and for further accounts of the personal estates of *Shipway* and *Matthews* come to the hands of their respective executors.— For this purpose the present bill set forth, that in *Michaelmas* Term, 1743, Lord *Sidney Beauclerk* and *John Bance Esq.*, executors of *William Hercy* deceased, filed their bill against the present plaintiff and others, and thereby stated, that the said *William Hercy* being seised and possessed of freehold, copyhold, and leasehold estates, and of other personal estate, made his will dated *April* 13th, 1742, and thereby devised to the plaintiffs (in that bill) and defendants *Mary Matthews* and *Robert Holdaway*, and the survivor and survivors of them, and the heirs, executors, and administrators of such survivor, all his real estates in the counties of *Berks* and *Sussex*, and elsewhere, in *Great Britain*, and all his personal estate, to hold to them the said trustees, &c. upon trust, that they should, by and out of the premises thereby devised to them, or the rents, issues, and profits of the testator's lands, or by sale or mortgage thereof, or of such part thereof as to them should seem most expedient, raise and pay money sufficient to defray his just debts and funeral expences in the first place, and as soon as the same might be done after his decease, and after payment of his debts, &c. to raise and pay annuities to his three daughters till their marriage, and upon their marriages to pay the portions therein provided, and the testator gave to the said defendant *Richard Matthews*, the clear yearly sum of 20*l.* to be paid him by the said trustees, out of the said estate, until plaintiff came of age, for his trouble in looking after the said estate during

(1) See as to this case *per Lord Redesdale C.*, 2 Scho. & Lefroy, 639. Upon the point in general, see *Earl of Deloraine v. Browne*, *antea*, 3 vol. 633. *et seq.*, with the Editor's notes *passim*, and the observations generally of Lord *Redesdale C.* in *Hovenden v. Lord Annesley*, 2 Scho. & Lefroy, 607. 624. 625. *et seq.* *Et vide* Ball & Beatt. 71., and *Chalmer v. Bradley*, 1 Jac. & Walk. 51. &c., *Jones v. Turberville*, *antea*, 115., *Andrew v. Wrigley*, *ibid.* 125., and *Pickering v. Earl of Stamford*, *ibid.* 214.

plaintiff's

plaintiff's minority. And the testator thereby charged all his real and personal estate with the payment of the said several sums of money, and after satisfaction thereof, he devised to the (present) plaintiff all the rest and residue of his real and personal estate, and appointed the plaintiffs (in the reciting bill) and the defendants *Mary Matthews* and *Robert Holdaway*, executors of his said will. And the bill further stated, that the testator died in *April*, 1743, without having revoked the said will, leaving the (present) plaintiff, his only son and heir at law, and three daughters, and that, on his death, the plaintiffs (in that bill) proved the will, and [\*] were desirous that the trusts thereof should be performed, and had applied to the defendants *Mary Matthews* and *Robert Holdaway*, to join them in proving the will, and in the execution of the trusts thereof, but that they had declined so doing, and the testator's personal estate not being sufficient to pay his debts, it would be necessary to sell part of his real estate, which they could not safely do without the directions of this Court, therefore the (then) plaintiffs, by their bill prayed that the defendants *Mary Matthews* and *Robert Holdaway* might either act in the said trust, or assign the same, and for proper accounts and directions for the management of the estates.

The present bill stated further that that cause came on to be heard 10th *May*, 1744, before the then *Master of the Rolls*, when his Honor declared the will well proved, and that it ought to be established, and the trusts performed, except as far as to any part of the estate, which might be comprised in settlements, and *Mary Matthews* and *Robert Holdaway* declining to act, they were decreed to release to the (then) plaintiffs, and it was referred to the Master to take an account of the testator's debts and funeral expences, and that the same should be paid out of the personal estate in a course of administration, and in case it should not be sufficient, the Master was to see what was due to *Mary Matthews* and *Holdaway* on account of their mortgages, and to take an account of rents and profits come to their hands; and it was ordered that the plaintiff's real estate not in settlement, or so much thereof as should be necessary, should be sold, and out of the money arising by the sale of the estates comprised in the defendant's mortgages, the defendants were to be paid the sums that should be reported due to them, and then such of the testator's other creditors who had a real lien on his real assets, and should not receive a satisfaction for their demands out of his personal estate, were, out of the residue of the money arising by the said sale, and out of the said rents and profits, to be paid what should be remaining due to them, according to the nature and priority of their said demands; but such of the said testator's other creditors as had no real lien on his real assets, and should receive a satisfaction for any part of their demands, out of the said testator's personal estate, were to receive nothing out of the said real assets until the other creditors were thereout paid equal with them: [\*] and then all the said creditors were to be paid, what should remain due to them *pari passu* out of the said real assets.

In pursuance of this decree, various proceedings were had before the Master, and some parts of the real estate were sold; but before the Master had made his report, Lord *Sidney Beauclerk* died intestate, after which *Bance* filed a bill of revivor and supplement against Lady *Mary Beauclerk* his widow, to which she put in her answer, in which she stated, that she did not know of more than 50*l.* having been received by Lord *Sidney* out of the estate of *William Hercy*: she admitted having taken out letters of administration, but that his assets were not sufficient to pay his debts or the monies so received.

The present bill further stated, that no further proceedings were had in

1793.

Hercy  
against  
Dinwoody.

[ \*259 ]

[ \*260 ]



1793.

*HERCY*  
against  
DINWOODY.

[ \*261 ]

in the bill against Lady *Mary Beauclerk*, but the decree was prosecuted with the other parties, but that, before the Master had made his report, the suit having become abated in the manner therein-after-mentioned, (i. e. by the death of *Bance* in 1755) plaintiff, in *Trinity Term*, 1756, filed his bill of revivor and supplement against *John Shipway* and others, stating the proceedings in the cause of *Beauclerk* against *Hercy*, the death of Lord *Sidney Beauclerk*, and of *Bance*, and that *Bance* had in his life-time received out of the personal estate and the rents and profits of the real estate, the sum of 5000*l.* and upwards; and that *Bance* was seised of a considerable real estate, and of personal estate to the amount of 30,000*l.*, and also setting forth that it was alleged by said *Shipway*, that *Bance*, on the 27th *August*, 1754, made his will, whereby he ordered all his debts to be paid, and gave and bequeathed all his real and personal estate to *Shipway*, his heirs, executors, &c., charged with his debts and legacies, and appointed *Shipway* executor, and that *Shipway* had proved the will, and possessed himself of the personal estate, and had entered upon, and was in possession of the real estates, whereof the testator died seised, and also setting forth the settlement upon the marriage of the said *William Hercy*, with *Elizabeth* daughter of *James Matthews*, dated 10th & 11th *June*, 1715, whereby the estates in *Berkshire* were settled to the use of *William Hercy* for life, remainder to *Elizabeth* for life, remainder to their first and other sons in tail, with remainders over, and whereby a power was given to the said [\*] *William Hercy*, to mortgage the premises, for any term of years, for any sum not exceeding 400*l.*; and *William Hercy* covenanted that such charge should be paid off within three months after his decease, and that said *William Hercy* in pursuance of the power, mortgaged the premises for a term of 1000 years, for securing the sum of 400*l.*, which mortgage afterwards vested in *Ann Heames*, in manner therein mentioned; and that the said *Ann Heames*, and other persons interested, had filed their bill of foreclosure against *Bance* and others, and upon the hearing of the cause, 7th of *March*, 1747, it was ordered, that it should be referred to the Master to take an account as usual, and upon payment of the mortgage money, there should be a reconveyance to *Bance* and the other trustees under *William Hercy's* will; but upon the said cause being reheard, the decree was varied, and it was ordered, that, upon payment of the mortgage money, &c. by the plaintiff, the reconveyance should be to him; and also setting forth that the Master by his report, 23d *May*, 1753, reported 256*l.* 3*s.* 9½*d.* to be due to the said *Ann Heames*, for interest and costs, which sum, together with the principal sum of 400*l.* plaintiff had paid, and taken an assignment of the premises, and that the plaintiff had, thereby, become a creditor on the estate of the said *William Hercy*, not only for the sums of 400*l.* and 256*l.* 3*s.* 9½*d.*, but also for a further sum of 50*l.*, and that *Mary Marshall* had possessed some part of the testator's personal estate: and also setting forth, that, since the hearing of the original cause of *Beauclerk v. Hercy*, he, the plaintiff, had discovered that the greatest part of the testator's estates were mortgaged to *John Goldwyn* and others; and also setting forth, that *Mary Matthews* and *Robert Holdaway*, having refused to prove the said *William Hercy's* will, plaintiff had taken administration of the personal estate of the said *William Hercy* unadministered by Lord *Sidney Beauclerk* and *Bance*, and that plaintiff was advised that, by the death of *Bance*, the suit was abated, and plaintiff was entitled to revive the same, and to have the said first-mentioned decree carried into execution: the said supplemental bill prayed that the said decree might be carried into execution, and the plaintiff and the other creditors of *William Hercy* might have the benefit thereof, and that *Shipway* might account for all such parts of the testator's personal estate, and of the

rents

rents and profits of his real estates, as were received by *Bance*, and that he might [\*] admit assets, or account for his personal estate, and in case it should appear that his (*Bance's*) will was duly executed, so as to pass real estate, that so much of the real estate should be sold, as should be necessary, and for accounts against the other defendants, and that the plaintiff and other creditors of *Hercy* should be paid their debts. The present bill then further stated, that the defendants, to that bill put in their answers, and that *Shipway* in his answer, admitted assets to pay the plaintiff's demands.

[But the answer of *Shipway*, having been relied upon by the Master of the Rolls, in giving judgment in this cause, it is more fully stated here, than in the said bill, and thereby, after having admitted the proceedings in the former cause of *Beauclerk v. Hercy*, the death of Lord *S. Beauclerk*, and that *Bance* died about the time stated in the bill, having received several sums of money out of the testator's estate, but not amounting to 5000*l.*, and made such will as was stated, and the defendant executor thereof, he stated that a charge being brought in before the Master to whom the cause was referred, upon the said *Bance*, the said *Bance* brought in his discharge thereto, (this appeared, by the evidence, to be in the year 1748), and the Master proceeded through such charge and discharge, whereby it appeared, what was then in said *Bance's* hands; and in order to avoid setting out the accounts, in relation to the said *Bance's* estate and effects, which were very voluminous, the defendant admitted he had possessed assets of the said *Bance* to pay the plaintiff's demands, "which admission he hoped would be binding upon him, with respect to the plaintiff *only*," then admitting the transactions as to the mortgage, and that plaintiff was thereby become a creditor, he said that he did not claim any mortgage, or incumbrance affecting the estate of *William Hercy*, save the sum of 405*l.* due to the defendant's testator *Bance*, by three notes of hand, and a further sum of 100*l.* 18*s.* for clear rent, (after a deduction,) and which he said he had been informed *Bance* claimed before the Master: and, by his further answer, the defendant said that he had set forth in the 1st schedule, to his account all the goods, &c. of *William Hercy*, possessed by *Bance* since the time of his examination in the cause *Bance v. Hercy*, as appeared to this defendant from the books of account of the defendant's testator *Bance*, and of whom and when he [\*] received the same, and also an account of all and every sum and sums of money, received by this defendant's testator, or by any other person or persons by his order or for his use, since the time of putting in his examination, for or on account of the real estates late of the said *William Hercy* deceased, which was possessed by the said *Bance*, and to what amount, and the particular amount of such rents and profits, and of whom, and when the said *Bance* received the same, as appeared to this defendant, by the books of account of this defendant's testator *Bance*: and that the defendant had also set forth in the 2d schedule, to his answer, an account of the several payments made by the said *Bance*, since the time of putting in his examination in the said cause, as appeared to the defendant by the said books of account, for which he received an allowance; and he admitted personal assets of *Bance* sufficient to answer what he had received of the personal estate, and rents and profits of the real estate, of the said *William Hercy*.]

And the present bill further stated, that the mortgagees and incumbrancers, by their answers, stated their mortgages and incumbrances, and their respective claims in respect thereof, and farther stated, that, by reason of the great intricacy of the said *William Hercy's* affairs, and the difficulties attending the prosecution of the suit, many of the parties had died, and the proceedings had become abated, particularly that

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*Shipway* was dead, having by his will, dated 3d April 1762, appointed *John Beard*, *William Dinwoody*, *John Dinwoody*, and *William Halliday*, executors, which *John Beard* and *William Dinwoody* were also since dead, and the bill also stated the death of other parties, and who were become their personal representatives. It further stated that the present defendants, *Dinwoody* and *Halliday*, had possessed assets of *Shipway* sufficient to answer what was owing from him, as executor of *Bance*, to the estate of *William Hercy*, and prayed as before stated, that the accounts directed by the before-mentioned decree, might be carried on against them.

[ \*264 ]

The defendants, *Dinwoody* and *Halliday*, stated by their answer, several decrees, and other means by which the estate of *Bance* had been distributed, and said that they were advised, that, under the circumstances, the suit ought not to be revived against them, for the purpose of affecting the estate of *Bance* with any [\*] account with the present plaintiff *Lovelace Hercy*, who has rested and suffered so many years to elapse, and suffered the funds to be distributed in the manner stated, without any objection or opposition thereto; on the contrary, they insisted that he had lain by and suffered the estate to be applied in discharge of legacies, and the residue to be transferred under an order of this Court, as far back as the 6th of March 1771, which is twenty years ago, and therefore that the estate had been fully administered by this Court, and the cause perfectly at an end, with the privacy of the plaintiff; and they submitted that the plaintiff being a party to the suit, was bound and concluded by the proceedings, and all that had been done in it.

The cause was heard the 1st and 2d of this month by the Master of the Rolls sitting for Lord Chancellor.

Mr. Solicitor General and Mr. Cox for the plaintiffs.

The plaintiff is a creditor suing for himself and other creditors of the estate of his father, and as such is entitled to indulgence, at least so far as he sues in the right of others.

No objection is set up but mere length of time. It is true that, in certain cases, this Court will suffer length of time to operate in analogy to the statute of Limitations; but where there has been a decree for an account, the Court will not suffer the statute of Limitations to be pleaded, 1 Pr. Wms. 742. (*Hollingshead's case*.) There can be no difficulty in this case, as there was an acknowledged balance in the hands of *Bance*, and *Shipway* has admitted assets; and with respect to *Matthews* the case is plain, he was a receiver, there has been no decree against his assets, it is a mere simple contract debt. He is in the nature of a trustee, against whom length of time is no bar. In *Johns v. Menhinnot*, about three years ago, there was a decree after a great many years. *Searle v. Lane*, 2 Vern. 37. 88., if an executor pays a bond before money decreed, he must pay the debt by decree, *Opie v. Godolphin*, Pre. Ch. 548. *Earl of Pomfret v. Lord Windsor*, 2 Vesey, 472., where the infant attained her age in 1719, and the bill was not filed till 1746, yet there was a decree.

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[\*] Mr. Attorney General, Mr. Lloyd, and Mr. Campbell, for the defendants *Dinwoody* and *Halliday*.

This is a bill merely by a single creditor, and though he says he sues for himself and other creditors, he is the only plaintiff. He sued out his administration in 1790, upon an estate upon which he had the same claim in 1764. He ought not to be admitted to call now for an account, after he has stood by during the cause against *Shipway* for so many years. Courts give relief only in cases of conscience and of diligence, they will not give relief where there is delay. If the plaintiff was now to recover, as he claims for himself and other creditors, he might say

to

to the other creditors, that he is not bound to distribute the effects among them; he might plead the statute of Limitations, or something equal to it, by analogy. Here the first suit was in 1748. Under the account directed in that cause, *Bance* brought in his charge and discharge; nothing further was done in the life-time of *Bance*, though he lived to 1755. In 1756 the plaintiff filed his bill against *Shipway*, and in 1757, *Shipway's* answer came in, admitting assets of *Bance*: there was then no difficulty in proceeding, yet he permits *Bance's* assets to be distributed without interfering. Mr. *Mitford's* argument in *Earl of Deloraine v. Brown* (*ante*, v.iii. p.693.) is here conclusive; he there said, that a party lying by so long, and suffering persons to treat property as their own, should not have relief in a court of equity. But here it cannot be called merely lying by; it is acceding to the acts done as to *Bance's* property. In all the cases where there has been such delay, relief has been refused, *Hunton v. Davis*, 2 Ch. Rep. 44. *St. John v. Turner*, 2 Vern. 418. *Western v. Cartwright*, Sel. Ca. temp. King, 34. *Pooley v. Ray*, 1 Wms. 355. Even in the case of a bill of review after twenty years, it will not lie. *Smith v. Clay* (*cited ante*, vol. iii. p. 639. n.) *Finch v. Finch*, before the late Lords Commissioners (*ante*, p. 38.)

Mr. *Brown*, for the representative of *Matthews*, said, that upon a search no papers could be found.

This day his Honour gave judgment in this cause to the following effect.

[\*] *Master of the Rolls.* —

The matter in question is not inconsiderable in point of value, but in precedent is very important indeed. The same circumstances must happen very frequently in this Court, therefore I thought it right to consider it fully.

Upon consideration, I think I should not do justice to the public, if I permitted this cause to proceed as to the accounts prayed against the estates of *Bance* and *Shipway*.

*Hercy's* executors filed their original bill immediately upon his death, and in 1744 there was a decree in that cause.

In 1748 *Bance* put in his examination.

This was an important æra in the cause, from which the laches may be imputed.

In 1749 *Lovelace Hercy* came of age, and found the cause in this stage.

But it appears that, soon afterwards, he found that, in consequence of the incumbrances of the settled estate, he was, in fact, entitled to the reversion, though by the decree in *Heames v. Bance*, the redemption had been given otherwise — therefore, at this time he was conusant of his right.

In 1750 *Matthews* put in his examination. It is said as to him, that he was an officer of the Court, and bound to account annually. But he was not, in fact, a receiver appointed by the Court. The will gave him 20*l.* per annum to manage the estate till the son came of age; and I do not know that they continued the management after that time. He continued in possession by the mere consent of *Lovelace Hercy*.

*Matthews* was in the habit of paying over the money to *Bance*.

These are all the proceedings in this Court.

In 1755 *Bance* died; he made *Shipway* his executor.

[\*] *Lovelace Hercy* was one of the heirs at law.

At that time, he was under no incapacity to sue — on the contrary, in 1756 he filed his bill against *Shipway* and many others.

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against  
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In 1757 *Shipway's* answer came in, and, by that answer, he insisted upon being a creditor (here his Honor stated *Shipway's* answer.)

After this, What was it incumbent upon *Hercy* to do? Certainly he was bound to proceed with due diligence.

In the mean time *Chandler* filed his bill against *Shipway*, and *Lovelace Hercy* was a party to that cause.

The former cause was totally laid aside till 1790.

In *Chandler v. Shipway*, a decree was made for the distribution of *Bance's* estate. Several motions were made in that cause to which *Lovelace Hercy* was a party, by which *Bance's* debts and legacies were paid — *Lovelace Hercy* sits by, and takes no notice.

In 1762 *Shipway* died.

In 1764 *Matthews* died.

These are the material dates in the cause.

It is insisted that the Court is bound to permit the plaintiff to revive.

It is said, truly, that it is not like the case where presumption can be made of a payment; for that neither *Bance* or *Matthews* could discharge themselves, but by payment into Court.

It certainly differs very widely from the case where any person has a right to call on another for the payment of money.

[ \*268 ]

The plaintiff must then contend, that no distance of time can bar a demand of this sort — for if any distance of time will bar, [\*] I think it must be admitted there is sufficient laches in this case.

As to the reasoning in the Earl of *Deloraine v. Browne*, I think, on principles of public policy, the person guilty of such laches shall not be relieved; and if any benefit arise to the accounting party, he will be entitled to it after such length of time.

I am afraid there are many other cases in this court under similar circumstances.

As to the cases which have been cited,

*Hollingshead's* case, 1 P. Wms. 742, decides, that, after a decree, the statute of Limitations is not pleadable; and certainly no demurrer lies to a bill of this nature: but nothing appears from that case, but that *as a plea* the defence was not allowed, and that I admit.

The Earl of *Pomfret v. Lord Windsor* is a very extraordinary case, there an infant was entitled to the residuary personal estate of Lord *Jefferies*, and there was very gross conduct in Lord *Windsor* — and this is certainly the strongest case in favour of the plaintiff.

*Johns v. Menhinnot* is a very strong case, yet there were several circumstances in that case that do not exist in this — there the claim did not arise till after a life in being. It was a fraud to take possession of the estate without notice to the legatees. The estate was ordered to be sold; but, in fact, never was sold. The receiver continued to keep possession until his death, and Sir *John Molesworth* did the same, and then gave it up to *Menhinnot*, and there is no objection made by Lord and Lady *Bayham* to the account. I doubt whether that case can bear on the present. Do they establish this broad ground, that, after any length of time, parties have a right to prosecute such accounts?

As to the Earl of *Deloraine v. Browne*, the counsel have referred principally to the argument; for not much was said there by the Court. With respect to *Smith* and *Clay*, of which there is a very accurate note there, I beg particularly to refer to the words of Lord *Camden*, which are peculiarly energetic.

[ \*269 ]

[\*] Here, surely, *Lovelace Hercy* has slept upon his right.

Then it is said, that the rights of other persons are concerned:  
— but

— but I cannot say that creditors shall come at any distance of time; they must abide by the conduct of the party who manages the cause.

*Huet v. Fletcher*, 1 Atk. 467. *St. John v. Turner*, 2 Vern. 418. *Western v. Cartwright*, Ca. temp. King, 34. *Pooley v. Ray*, 1 Wms. 355, which I mention for the particular manner in which Lord Cowper grounded his decree, as I think it appears by the Register's Book.

Then am I bound by any rules? The cases depend on their particular circumstances. —

I do not agree that it is perfectly clear that, at *Bance's* death, he was indebted to *Hercy*. It appears that some payments were made after his examination. What did *Hercy* do when he came of age? He permitted *Bance's* estate to be divided.

Therefore, after this length of time, and so many representations, I think these accounts should not proceed.

As to costs,

It is very likely that if the accounts were taken, it might turn out that a balance was due, and there have been some neglects on both sides; and, perhaps, there is no case in point: therefore I may do injustice by giving costs. If it was necessary, in order to deter similar suits, I would give costs: but as this case stands very much upon its own circumstances, I do not see any objection of that sort.

*Mr. Solicitor General*. Then this must be on the terms that the defendants waive all claims on *Hercy's* estate, and pay the costs of the original suit. (2)

To this the Master of the Rolls assented.

Bill dismissed.

(2) R. L. 1792. A. fol. 320. accordingly.

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*Hercy*  
against  
*Drummond*.

[\*] UTTERSON, - - - - Plaintiff, [\*270]  
MAIR the Executor, and Others the Assignees of ELIZABETH [Vide S. C.  
TYLER, a Bankrupt, deceased, - - Defendants. 2 Ves. jun. 95.]

(Reg. Lib. 1792. B. fol. 619.)

*Lincoln's Inn*  
*Hall*, 10th  
*April*.

THE bill stated, that previous to, and in the year 1781, *Elizabeth Tyler*, heretofore of *London*, but now deceased, was a very considerable Navy agent, and having, in *August*, in the said year 1781, occasion to borrow a sum of money, applied to the plaintiff to assist her with the loan of 10,000*l*. Bank 3 *per cent.* consolidated annuities, upon her giving him an engagement to replace in his name a like capital sum, and, in the mean time, to pay him an interest equal to the amount of the dividends on the said stock, and as a further security, making a deposit with him of the grand bill of sale of a vessel called *The Lady Townshend*, of which she was at that time the sole owner: That the plaintiff on the 27th of *August*, 1781, executed to the said *Elizabeth Tyler* a letter of attorney, empowering her to sell 10,000*l*. Bank 3 *per cent.* consol. annuities, then standing in the plaintiff's name, and the said *Elizabeth Tyler*, thereupon signed and delivered to the plaintiff a memorandum in writing, in the words and figures following (that is to

Bill against the executor and assignees of a certificated bankrupt deceased, for an account: the assignees demurred; demurrer allowed: the executor only being liable to the creditor; and the assignees to the executor only. (1)

(1) Vide *Elmslie v. M'Alay*, *antea*, 3 vol. 624., and the Editor's note, referring to *Alinger v. Rowley*, 6 Ves. 749. *et seq.* See also *Troughton v. Binkes*, 6 Ves. 573. 575.

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against  
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say) " *London 27th August, 1781, I do hereby promise to replace and pay the dividends of 10,000*l.* consol. 3 per cent. annuities, in the name of John Utterson, Esq. for the sale of which he has given me a power of attorney, dated 27th August, 1781: As a security for the above, Mr. Utterson has got my assignment of the ship *Lady Townshend*, which he is to return, on my fulfilling the above. (Signed) Elizabeth Tyler."* And the said *Elizabeth Tyler*, at the same time delivered to the plaintiff the grand bill of sale and assignment to her of the said ship *Lady Townshend*, and for which, plaintiff gave her a receipt and undertaking to return the same on her fulfilling her aforesaid agreement:

That the said *Elizabeth Tyler* afterwards sold out the said capital sum of 10,000*l.* consol. 3 per cent. annuities, and received the produce thereof:

[ \*271 ]

That in *March, 1786*, a commission of bankrupt issued against said *Elizabeth Tyler*, and she was thereupon found and declared [\*] a bankrupt, and the defendants *Sir E. Vernon, Knt. Thomas Hankey, John Mair* (since deceased) and *Malcolm Cockburn*, were chosen assignees, and the said *Elizabeth Tyler*, afterwards, in her life-time, duly obtained her certificate under the said commission:

That *Elizabeth Tyler* did not, previous to the issuing of said commission of bankrupt against her, re-transfer into the name of plaintiff, or pay to or account with him for the amount or value of the said capital sum of 10,000*l.* 3 per cent. consol. annuities, or any part thereof, and therefore the plaintiff at a meeting of the commissioners under the commission, held for receiving proof of debts, offered to prove the sum of 712*l.* 10*s.* being the value of 10,000*l.* 3 per cent. consol. Bank annuities, on said 9th day of *March, 1786*, the time of issuing said commission of bankruptcy against said *Elizabeth Tyler*; but the assignees objecting to the admission of such proof, the plaintiff, in *December, 1787*, preferred his petition to the then Lord Chancellor, praying that he might be at liberty to go before the said commissioners in the said bankruptcy, and prove the value of 10,000*l.* 3 per cent. consol. Bank annuities, as upon the day of issuing the said commission, and that he might be paid by Messrs. *Mildred and Co.*, bankers, the sum of 825*l.* 16*s.* 9*d.* deposited in their hands, being the produce of said ship *Lady Townshend*, which had been sold by the assignees with the consent of the plaintiff, and that the plaintiff might come in as a creditor on the bankrupt's estate, for the difference of the value of said 10,000*l.* Bank 3 per cent. annuities after deducting the said sum of 825*l.* 16*s.* 9*d.* deposited in their hands, being the produce of said ship *Lady Townshend*, which had been sold by the said assignees, with the consent of plaintiff, and receive a dividend upon such difference, equal with the rest of the creditors who had or should prove debts under the said commission:

[ \*272 ]

That upon hearing the petition, it was ordered that it should be referred to the Master, to take an account between the plaintiff and said *Elizabeth Tyler* the bankrupt, relating to said 10,000*l.* 3 per cent. Bank annuities; and by order made 25th of *January, 1788*, it was ordered that plaintiff should give to Messrs. *Mildred and Co.* authority to pay the said assignees said 825*l.* 16*s.* 9*d.* deposited in their hands, as the proceeds of the said ship *Lady Townshend*; which authority the plaintiff gave [\*] to the assignees, and they, by virtue thereof, received from the said Messrs. *Mildred and Co.* the said 826*l.* 16*s.* 9*d.*; that the Master by his report 23d *April, 1789*, certified that the market price of said 10,000*l.* Bank 3 per cent. annuities on the 9th of *March, 1786*, when the commission of bankrupt issued against the said *Elizabeth Tyler* was 70*l.* per cent. which would have produced 7012*l.* 10*s.* and which 7012*l.* 10*s.* the plaintiff afterwards petitioned the Chancellor that he might be at liberty to prove as a debt under the said commission; and upon

upon hearing that petition, it was ordered that the parties should proceed to trial at law, upon the issue, whether said *Elizabeth Tyler* was indebted to the plaintiff, at the time of her becoming bankrupt, in any and what sum of money, in respect of the 10,000*l.* 3 *per cent.* consol. annuities; and further directions were reserved until after the trial of said issue:

That upon the said trial of the issue, the jury by consent found a verdict for the plaintiff, subject to the opinion of the court on a case to be stated:

That a case stating the facts as agreed to between the parties, was argued before the Court on the 5th of *February*, 1790, when it was ordered that judgment should be entered for the plaintiff, which was accordingly done; a verdict was entered for the plaintiff, for 5750*l.* being the value of 10,000*l.* 3 *per cent.* consol. annuities at 57½ *per cent.* the market price of that fund, on the 2d of *May*, 1785, when it was proved the said *Elizabeth Tyler* became bankrupt; that the assignees, not being satisfied with the verdict, applied by petition to the Lord Chancellor, and obtained an order for a new trial, and in *Michaelmas* term 1790 the issue was tried, when a special verdict was found, which was twice argued, and in *Hilary* term 1792, the Court gave judgment for the assignees; and in consequence thereof the claim which had been entered on behalf of the plaintiff, in respect of said 10,000*l.* stock, upon the proceedings under said commission, has been since expunged from the proceedings:

The plaintiff, therefore, insisted that, being, by the decision of the said Court of King's Bench, prevented from proving any debt in respect of the said 10,000*l.* Bank 3 *per cent.* consol. annuities, under said commission of bankrupt, and receiving a dividend, [\*] that he had a demand and was a creditor upon the said *Elizabeth Tyler* personally, in respect thereof, and the interest or dividends thereof, and to have said stock replaced by her, out of her property or effects remaining after payment of the debts proved under said commission, and such property as was acquired by her after she obtained her certificate:

[ \*273 ]

That *Elizabeth Tyler* died on 15th *March*, 1791, having made her will dated 17th *February*, 1791, and thereby appointed the defendant *Mair* and others executors and trustees, and that the defendant *Mair* had alone proved said will, and was the sole acting executor, and had possessed himself of *Elizabeth Tyler*'s estate and effects, to a considerable amount:

That the assignees had paid the several creditors who had proved debts under said commission 20*s.* in the pound, and said *John Mair*, one of said assignees, had lately died, having previous thereto accounted for such part of said bankrupt's estate as came to his hands unto the other assignees, and that they now have in their hands an overplus of bankrupt's estate, to a large amount which remains unaccounted for to the defendant *Mair*, as acting executor under the will of *Elizabeth Tyler*:

That the plaintiff having applied to the defendant *Mair* acting executor of said *Elizabeth Tyler*, to purchase and re-transfer into his name the capital sum of 10,000*l.* Bank 3 *per cent.* annuities, and to pay to him a sum of money equivalent to the amount of the dividends that would have accrued due thereon, and the defendant *Mair* having refused to pay the plaintiff's demand, the plaintiff in *Hilary* Term 1792 commenced an action at law in the Court of King's Bench, against the said defendant *Mair*, as the acting executor of the said *Elizabeth Tyler*, upon the aforesaid agreement or undertaking of the 27th of *August*, 1781, and the defendant *Mair* having put in a plea of *plene administravit*, the action was tried at the Sittings after *Trinity* term, when the plaintiff obtained a verdict for 11,300*l.* besides costs, and caused judgment to be

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entered up thereon, for that sum, against the future assets of *Elizabeth Tyler* when they should come to the hands of the defendant *Mair* her executor.

[\*] The bill therefore, suggesting that the defendant *Mair* had not duly administered the assets of his testatrix, and that a considerable part thereof remained in his hands, charged that *Elizabeth Tyler*, at the time of her becoming a bankrupt, was possessed of, or entitled unto effects and property to the amount of many thousand pounds more than sufficient to pay the said creditors, who proved under the said commission, the full amount of their debts; and that said defendants, the assignees, possessed themselves of her effects, and that they have paid the several creditors who so proved their debts, 20s. in the pound, and that a balance of 15,000*l.* and upwards, remained in their hands.

The bill further charged, that the said assignees received several large sums of money out of the bankrupt's estate (particularising them) after they had paid said bankrupt's creditors 20s. in the pound, and that the same remained in their hands, and said *Elizabeth Tyler* after she obtained her certificate under said commission, carried on trade or business, and thereby acquired property to a very considerable amount, which had been received by defendant *Mair*, as her executor, and that the defendant *Mair* threatened to call upon the defendants, the assignees, for the money remaining in their hands on balance of their accounts, and to collect the outstanding particulars of her estate; that the assignees threatened, that they would settle their accounts with, and pay over the balance to the said defendant *Mair*, as such executor, which if they should do, *the plaintiff charges there is great reason to apprehend, from the circumstances and situation of said defendant Mair, the same will be lost and dissipated, and that defendant Mair is now an improper person to be intrusted with the receipt thereof*, so that the plaintiff will not be able to obtain from him a specific performance of said *Elizabeth Tyler's* agreement with plaintiff, dated 21st August, 1781, or any satisfaction out of her estate or property, in respect of the value of the said 10,000*l.* stock, or the interest thereof; and, *therefore, the plaintiff insists, that the defendant, the assignees of said bankrupt, ought to pay to the plaintiff said 11,900*l.*, the amount of such damages, and also the costs of said action, out of the property or effects of the said Elizabeth Tyler remaining in their hands as aforesaid, and the said assignees ought to be restrained by the injunction of the Court, from paying over to the said James [\*] Mair, and that he ought in like manner to be restrained from receiving from them, any part of the monies and effects in their hands belonging to said Elizabeth Tyler: and the bill prayed an account of the bankrupt's estates come to the hands of the defendants, and that the defendant *Mair* might pay the balance in his hands into the court, and the defendants, the assignees, might be restrained from paying the balance in their hands to the defendant *Mair*, and the defendant *Mair* from receiving the same, and that the bill might be taken as a bill of discovery only against the defendant *Mair*; and for a receiver.*

[ \*275 ]

The defendants, the assignees, put in a demurrer to the whole discovery, (2) and to the relief prayed against them by the bill; with an answer admitting the bankruptcy of *Elizabeth Tyler*, and that they (together with *John Mair*, deceased,) were chosen assignees, and that they were the surviving assignees at the death of *Elizabeth Tyler*, and that the defendant *Mair* was her executor and had proved the will.

The demurrer being set down for argument,

(2) *This is inaccurately stated even upon the face of it: the demurrer was in terminis to every particular passage in the bill (recapitulating each) except the circumstances above-mentioned as being answered.* R. L.

Mr. Attorney General, Mr. Mansfield, and Mr. Stratford, in support of the demurrer.

The short ground of this demurrer is, that every creditor of a deceased person cannot call upon the several debtors of that person, but can only call upon the executor of the deceased person, to sue the debtors to his estate: this is determined in *Elmslie v. M' Aulay*, (*ante*, v. 3. p. 624.) In the present case, the application ought to have been by petition in the bankruptcy: otherwise every creditor who becomes such after the act of bankruptcy, and consequently cannot prove under the commission, may file a bill against the assignees. Here the only claim of the plaintiff, is to be paid out of the assets of Mrs. Tyler. The assignees, for any surplus they have, are answerable only to her or her representatives. If there could be any title to file this bill, it must be as representative of the bankrupt, which the plaintiff is not. But, in this case, even the representative of the bankrupt could not file this bill, but must proceed by petition: and if the plaintiff had done so, there would have been a short answer to the application, that there is a petition by the [\*] creditors who have proved, for interest out of the surplus, which (if it succeeds) will exhaust the fund.

Mr. Solicitor General, Mr. Grant, and Mr. Stanley, for the plaintiff.

If this demurrer be any thing, it is a demurrer to the whole bill; and then it is over-ruled by the answer. But the demurrer is bad in principle. It is not true that a creditor cannot call upon any person but the representative of his debtor. It is by no means uncommon to make other persons having the property of the debtor in their hands parties, as well as the representatives; as in the case of the *Bank and South-sea House*, which really are debtors to the estate. In the case at the Rolls, the first suit was against *Jane Ogilvy* as executrix of her husband *John Ogilvy*, and they had sued out a *ne exeat regno* against her; it was impossible for her to account for the estate of *Patrick Ogilvy*, for *John's* title had not accrued; therefore, it seemed necessary to have an account of *Patrick Ogilvy's* estate against his executor, The Master of the Rolls dismissed the bill, but excepted the case where there was collusion between the executor and the possessor of the fund. — When that is the case a bill of this sort may be supported. It is so laid down by Lord Hardwicke in *Newland v. Champion*, 1 Vesey, 105. There may be cases where the executor is an improper person to have the assets, and where the Court would appoint a receiver; as where the executor is insolvent, *Taylor v. Allen*, 2 Atk. 213. Here we have charged that *Mair* is insolvent, at least that there would be danger in letting the fund come to his hands, and the demurrer admits all the facts in the bill to be true. *Non constat* then, that we may not show this to be a case for a receiver; therefore though the matter of the demurrer may be such as would go to the dismissal of the bill, that may be no reason why there should not be an answer.

Mr. Attorney General in reply.

In the present case, the plaintiff is not entitled to either the discovery or the relief, because the discovery is ancillary to the relief, and he cannot have the relief, without the court laying down the principle, that every creditor of a fund may file a bill [\*] against every debtor to it. Is it useful for the court to have such a jurisdiction? Admitting that *Mair* may not now be so proper a person to have the administration of the assets, as at the time he was appointed; on a bill filed, a proper person would have been appointed receiver. So in the case of collusion between the personal representative, and the person having the fund, a receiver would be appointed. The case of the *Bank or South-Sea House* being ordered to transfer a sum belonging to the testator to the Accountant-General, is rather against the remedy in the case of a private debtor.

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*Elmalie v. Ogilvy*, is an authority directly with us; it was dismissed on the very principle that a creditor cannot maintain a bill against the debtor of his debtor; collusion was not charged; if it had, it would not have been sufficient. As to there being a demurrer and answer, the demurrer is to one part of the bill, the answer to another, which does not over-rule the demurrer.

Lord Chancellor. — Here the answer does not touch the matter covered by the demurrer.

But there seems no justice in such a proceeding as this. If it is clear that the bill ought to be dismissed at the hearing, it may be so upon demurrer. This bill is by a creditor who has obtained judgment *quando acciderint*, therefore it is right as far as it seeks a discovery against the executor; because if he had a debt accrued after the act of bankruptcy, it would give him a title to the surplus. But the assignees are made parties merely because they may pay to the representatives: the consequence would be that every creditor might support a bill against every debtor. And *cui bono*? If the executor is improper, (and here he seems sufficiently charged to be insolvent,) the Court would appoint a receiver who might bring actions, and there would then be no more parties before the Court, and no delay. Suppose it was clear that assignees would pay over a surplus to an insolvent executor, the Court, [by its peculiar jurisdiction in bankruptcy, would certainly prevent them, (3)] so that creditors may always be provided for in a shorter way than by such a bill.

Demurrer allowed.

(3) *Vide* 2 Ves. jun. 98.

[ \*278 ]

[*Vide* S. C.  
2 Ves. jun. 98.]

Lincoln's Inn  
Hall, 31st Oct.  
1792.

Lords Com-  
missioners

Eyre, Ashhurst,  
and Wilson.  
11th April,  
1793, before  
L. Ch. Lough-  
borough.

[\*] ABELL *against* HEATHCOTE.

(Reg. Lib. 1792. A. fol. 337. b.)

UPON exceptions to the Master's report, — The estate, of which the title to a third was now in question, belonged to *John Nodes*, and was the subject of a marriage settlement, by which it was made subject to

A power to sell or exchange extends to making partition. (1)

(1) Lord Eldon C. doubted whether the present case amounted to a decision upon this abstract point, considering it supported by the words "or such other equivalent." See 11 Ves. 476., 1 Madd. Rep. 225, 226. His Lordship observed, on the 25th July, 1820, that he is still of opinion, that, in point of law, a power to exchange ought not to be held to include a power to make partition. His Lordship's sentiments on the subject in the year 1805, will be seen in *M'Queen v. Farquhar*, 11 Ves. 473. 476. *et seq.* In the former reference (p. 473.) his Lordship, adverting to the principal case, and dissenting from the reasons given by the Lords Commissioners, says: "The Lords Commissioners declined to decide the question, recommending another argument, and the Lord Chancellor puts it not upon the power to sell, but upon the power to exchange; or, speaking more accurately, the power to convey in exchange for or in lieu of other lands. But the question before me is not whether a power to exchange includes partition, but whether a power to sell authorises partition."

And his Lordship afterwards, again alluding to the principal case, at p. 276. adds: "I doubt whether the language I hear and have read, that a power of exchange is well executed by a partition, is authorised by any thing in that decision. Exchange and partition are very different. According to *Sheppard's Touchstone* and other old books, you cannot exchange until there has been a partition. There is infinite difficulty in saying

to a charge of 100*l.*, a-year, for the life of his wife *Catherine* (afterwards *Catherine Edwards*), and subject thereto, was settled upon the male issue of the marriage in tail, remainder to the female issue of the marriage. The settlement was confirmed by his will: *John Nodes* died, leaving three sons and three daughters. Of these sons *Charles Nodes* died soon after the father, without issue. Of the daughters, *Sarah* was married to *Robert Jaques*, junior; *Catherine* remained unmarried, and *Margaret Mary* afterwards married *Richard Price*. A commission of bankrupt issued against *Jaques* junior, the husband of *Sarah*, 4th of April, 1775: *Sherwood* and *Northage* were chosen assignees. On the 25th of May, 1776, *Jaques* the younger obtained his certificate. In August following *Henry Nodes*, (surviving his brothers *John* and *Charles*, who both died without issue, also died without issue, by which event the estate descended, in undivided thirds, upon *Sarah Jaques*, (or *Robert Jaques* junior, in her right,) *Catherine Nodes*, and *Margaret Mary Nodes* (afterwards *Margaret Mary Price*). On the 25th of July, 1781, the commissioners under *Jaques* junior's commission made a bargain and sale to the assignees of all such right and interest, or possibility of interest, as *Jaques*, in right of his wife, might have to the undivided third part of the estate. And in the same year some timber having been felled on the estate, *Price* and his wife filed a bill of interpleader against *Jaques* and his wife, and the assignees, praying that it might be settled to whom the third part of the produce should be paid; and the assignees, by their answer to that bill, disclaimed, for themselves and the other creditors of *Jaques* the younger, all title to the same. Afterwards, in 16th February, 1782, the assignees were, upon petition, removed, and *Jaques* the father was chosen sole assignee; and an assignment, bearing date 23d of February, 1782, was executed by *Sherwood* and *Northage* to him; and, by indentures of lease and release, [\*] dated 25th and 26th of February, 1782, reciting the above matters, and the death of *Henry Nodes* without issue, and *Sarah's* (or said *Robert Jaques* junior) becoming entitled to one undivided third part of the premises, and that doubts had arisen whether the remainder expectant, to which *Sarah* was entitled, did not, by virtue of the said commission, become vested in the commissioners, and therefore they had executed the said bargain

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against  
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" saying a partition, under the execution of a power by a tenant for life with those who  
" have the inheritance in the other moiety, could be called an exchange. I am not  
" surprised that the Lords Commissioners in *Abel v. Heathcote*, had considerable doubt  
" upon it, and I should rather have said, upon that case, that a partition was a convey-  
" ance for 'such other equivalent interest' in lands (according to the expression of the  
" deed,) 'as to the trustees should seem proper,' than put it upon the ground that a power  
" of exchanging authorised an exchange by partition. Certainly receiving the entirety  
" instead of a moiety does appear like receiving 'such other equivalent interest' in  
" lands, &c. But I am not called upon to decide whether a power of exchange can be  
" well executed by partition: a point which, if it had been decided by that case, I would  
" not disturb. This case was discussed in short opinions given by Sir Dudley Ryder  
" and Mr. Finner, and a very elaborate one by Mr. Booth. Mr. Booth's opinion ex-  
" presses, in much better terms than I can, many of my own notions upon the subject."

Sir Thomas Plumer, Vice-chancellor, (in *Attorney General v. Hamilton*, 1 Madd. Rep. 225, 226.) notices these observations of Lord Eldon, and that his Lordship considers the case as resting on the peculiar words "such other equivalent," rather than as amounting to a decision upon the point; and the Vice-chancellor was of the same sentiments. The Editor thinks it very material, upon this point, that the profession should have the whole of the circumstances before them, and is gratified to observe that the Master's report, which Lord Loughborough confirmed, does seem partly to illustrate the grounds of the decision. It is not in the reports either of Mr. Brown or Mr. Vesey; but the Editor has annexed it, from Reg. Lib. to page 281. *postea*. It should also not escape notice that Lord Eldon himself seems to have been the counsel who, in arguing the principal case, made use of the precise argument of the "equivalent interest" (see p. 283. *postea*), and must therefore have known the strength and weakness of the case throughout, as well as all the grounds of the ultimate decision.

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 A bill  
 against  
 HASTINGS.

and sale; and reciting also, that *Sherwood and Northage*, and all the other creditors of said *Jaques* the younger, had released their claims to their debts (except two, which *Jaques* junior undertook by such deed to pay): *Jaques* the elder bargained, sold, and released to *Jaques* the younger, that undivided third part of the premises comprised in the bargain and sale of the 25th of July, 1781, and the right and title of *Jaques* the elder therein.

Previous to some of these transactions, but after the death of *Henry Nodes*, and consequently when the estate had descended upon the three coparceners in undivided third parts, *Margaret Mary*, being about to be married to *Richard Price*, a settlement was made in contemplation of that marriage, by which her undivided third part of the premises was settled to the use of *Richard Price* for life; remainder to *Margaret Mary* for life, remainder to the trustees *Lytton* and *Smith*, to preserve contingent remainders; remainder to the use of the children of the marriage; and, in the settlement, was contained a power for the trustees, with the consent of the said *Richard Price* and *Margaret Mary* his wife, to make sale of, and convey, surrender, and assure, or convey in exchange, for or in lieu of other manors, lands, or hereditaments, to be situate somewhere in England, all or any of the said freehold and copyhold lands, &c. thereby granted, for the best price, &c. in money, or for such other equivalent (2) in manors, lands, or hereditaments, as should to them the trustees (with consent as aforesaid) seem reasonable, and for that purpose, by any deeds, &c. to revoke, determine, and make void the uses therein-before limited, and declare such new uses as should be necessary in the said premises. The present plaintiff *Abell* having purchased the undivided third part of *Jaques* and his wife, filed his bill against *Catherine Nodes*, (who was entitled to another third part,) and against *Price* and his wife, and their daughter *Catherine* [\*] *Nodes Price*, (who are entitled to the remaining third,) and also against the annuitants and trustees; and, upon the hearing of that cause, a decree was made, 29th January, 1788, by which it was referred to the Master to enquire in what shares and proportions the parties were entitled to the estate in question. On the 23d of May, 1789, the Master made his report that the plaintiff could make a good title to one undivided third part of the premises in question, (being the part which was the subject of the present bill,) subject to the mortgage and annuity affecting the same; that *Catherine Nodes* could make a good title to another undivided third part; and that *Richard Price*, *Margaret Mary* his wife, and *Catherine Nodes Price* their daughter, could make a good title to the remaining third part. The defendants in that suit excepted to the report, in order that the plaintiff's title might be investigated: and, upon arguing the exception, it was over-ruled, and it was ordered that a partition should be made of the estate, in three equal parts, and a commission should issue for that purpose, and one-third part should be allotted to the plaintiff; and there should be a clause in the conveyance, declaring that the part so allotted to him should be a security to the defendants against any claims or demands of any of the creditors of *Jaques* the younger, under his bankruptcy: that another third part should be allotted to *Catherine Nodes*; and the remaining third to *Richard Price*, *Margaret Mary* his wife, and *Catherine Nodes Price*, to be held by the plaintiff and defendants in severalty. The commissioners, by their certificate dated 31st Oc-

(2) These Lord Eldon seems to have thought such material words as to support the decision, without resting it upon the abstract point that a mere power to exchange includes a power to make partition. See in *M'Queen v. Farquhar*, 11 Ves. 476., *Attorney General v. Hamilton*, 1 Madd. Rep. 225, 226, &c.; and note (1) *ante*.

tober, 1789, certified, that they found, by the marriage-settlement of *John Nodes*, the premises were subject to the annuity to *Catherine Nodes*; (then *Catherine Vaslet*, and afterwards *Catherine Edwards*;) and they apportioned that the plaintiff and the owners of his allotment should pay to the said *Catherine Edwards*, during her life, the sum of 70*l.*, part of said annuity of 100*l.*; and also 10*s.*, part of a fee-farm rent of 1*l.* 10*s.*, payable to the crown, in respect of the said entire estate; that *Catherine Nodes* should pay 10*l.* further part of such annuity, and 10*s.* further part of said fee-farm rent; and that *Richard Price*, *Margaret Mary* his wife, and *Catherine Nodes Price*, should pay 20*l.*, the remainder of said annuity, and 10*s.* remainder of said fee-farm rent. And afterwards, by deeds bearing date 19th and 20th March, 1790, the partition was made agreeable to such decree and certificate.

[\*] The plaintiff put this estate up to sale; and, in the particular, it was stated as being liable only to a fee-farm rent to the crown of 10*s.* a-year, and to an annuity of 70*l.* to *Catherine Edwards*; but, by a written article added to the particular, it was stated that it was intended (the widow being very old) to purchase a short annuity for securing her annuity, to indemnify the purchaser.

The defendant was the best bidder at that sale, and paid the deposit, and entered into the usual agreement to complete the purchase, upon having a good title made to him. Afterwards, upon laying the abstract before counsel, some difficulties arose on the goodness of the title, particularly whether the partition was within the power of the trustees; and also as to the rent-charge, and *Catherine Edwards's* annuity; as to which the agreement of the parties could not bind the crown and *Catherine Edwards*: also some doubts were entertained as to possible claims of *Jaques's* creditors on his interest in the undivided estate; in consequence of which the defendant *Heathcote* declined completing the purchase, and a bill was filed by the plaintiff for specific performance.

At the hearing of the cause, it was referred to the Master [Mr. *Pepys*] to enquire whether the plaintiff could make a good title; who reported that he could; and objections were taken to the report, in his office, in respect to the partition not being a valid execution of the power to sell or exchange, and also with respect to the fee-farm rent and annuity; but there was no objection as to the claims of *Jaques's* creditors.

The Master [Mr. *Pepys*] having made his report that the plaintiff could make a good title (3), the present exceptions were taken; viz. 1st. That the partition was not a good execution of the power. 2dly. [On the ground of incumbrances] as to the fee-farm rent. 3dly. As to the annuity. 4thly. As to the interest of *Jaques's* creditors.

Mr. *Mifford* and Mr. *Nedham* in support of the exceptions.

(3) The Master's report seems framed with much care, and to have been remarkably well expressed. Upon the point in question Mr. *Pepys* certified as follows: "But as to the first objection, though he did see it had been a matter of doubt amongst some of the counsel most eminent in conveyancing, whether the power above mentioned to sell or exchange could be construed to extend to the right of making a partition, yet upon the best consideration that he could give the subject, it did appear to him that it might be so construed, inasmuch as, he conceived, the power to exchange must be understood to include the power of conveying an undivided interest in the whole of the estate in return for a sole or separate interest in a divided part of the estate: or, in other words, to make a partition. And the proceedings in this court for the purpose of carrying the partition into execution had been such, that he was of opinion (as the counsel for the defendant had suggested no other objection to the title than what was there stated) that the above execution of the power was such as to enable the plaintiff to make a good title to the defendant of the said estate and premises. But whether, as the question above stated on the construction of the power contained in the settlement had been the subject of so much doubt, the Court would compel the defendant, under these circumstances, to accept the title, he submitted to the judgment of the Court." R.I.

The

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The question, whether the trustees have made a good execution of their power, will depend upon this, whether a power to *exchange* extends to a *partition*. Powers of this kind are construed strictly. The words, *make partition*, are commonly inserted in these [\*] powers; the omission of those words, therefore, would of itself raise a doubt whether it was the intention of the parties that the trustees should have such power. It is of importance that the purchaser should have such a title as he can carry to market; if there is a cloud upon the title, he ought not, therefore, to be compelled to take it. Now it is clear that a partition is not within the legal description of an exchange, which is a departing from lands in one place, to take other lands in another place. No case can be found that such a power has been held to extend to a partition. But it may be said it was under a decree, and therefore the children will be bound. Nobody is bound to take an equitable estate. The purchaser would be liable to a suit, and to a considerable charge: the decree is, in this case, no bar; and the conveyancers to whom it has been sent are very doubtful whether the power is well executed, and wish to have it decided. Another objection to the title is, that the whole estate being liable to the annuity of 100*l.* it is not thrown equally upon the three parts, but 70*l.* a-year is thrown upon the estate of Mr. *Abell*: there should have been an equal division of the charges. As to the estate being liable only to 70*l.* a-year, in truth it is liable to the 100*l.*: the agreement will not bind the annuitant, who may take her annuity out of what part of the estate she pleases; and though a short annuity has been purchased, there is no release. So though this part is sold as subject only to 10*s.* a-year fee-farm rent, it is subject to 1*l.* 10*s.*, as the crown cannot be compelled to take part of the estate as a security; and if either the annuitant or the crown comes on this part of the estate, it would only entitle the purchaser to a contribution, and the Court will not compel a purchaser to buy a chancery suit. There is also another exception to the title: one-third of the estate belonged to Mr. *Jagues*, from whom Mr. *Abell*'s title is deduced.

Upon this exception being stated, Mr. *Solicitor General* objected to its being gone into as irregular, there being no objection in the Master's Office on this account.

Mr. *Mitford* insisted that any objection might be taken to the title upon arguing exceptions, that the old method of taking the exception was generally, for that the Master had certified that the plaintiff could make a good title, whereas he ought [\*] to have certified that he could not make a good title; and that, under such general exception, any defect in the title might be stated; that the present method of stating the particular objection was only for convenience; but if it was necessary to give it in the form of an objection in the Master's office, it ought to be sent back to the Master for that purpose.

Lord Commissioner *Eyre* said that if there was a substantial objection, it certainly should not be precluded, but should be admitted, either by sending it back, or some other means.

Mr. *Mitford* stated that claims might arise by the creditors of *Jagues*, against which the purchaser ought to have an indemnity.

Mr. *Solicitor General*, Mr. *Mansfield*, Mr. *Lloyd*, and Mr. *Stanley*, for the plaintiff. It is incumbent on us to make it out, that the trustees had such powers as extended to a partition. The opinions of the conveyancers are, upon the whole, in favour of the title. The question depends on the meaning of the settlement, and whether receiving a divided third part of the same estate, for an undivided third part, does not amount to an exchange. At law, an exchange has particular requisites: but even, at common law, such an exchange would be good; it is not necessary, even there, that there should be a transmutation of possession;

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possession; but it is sufficient, that a different title is taken from that parted with, *Perkins*, Exchange 119. § 267—118. § 266. a rent may be taken for land, § 267, a release of estovers or right of way.—But an equitable exchange need not be so exact.—Here the words of the power are to exchange for other *manors, &c., or for any equivalent interests*. (4) Is not the taking a third undivided, *an equivalent interest*? (4) As to the interest of *Jacques's* creditors, that was discussed before; the decree was made the 29th of *January*, 1788; some of the parties were then adverse, the Master reported a good title to be made; and exceptions to the report were over-ruled. It appeared to be the case of an old bankruptcy, and no claims made under it.

Mr. *Mitford* in reply. As to the objection, that I have cited no cases like the present; it was incumbent on the other side [\*] to shew that the words used here, extend to the case of a partition. The present case is entirely new. Those cited on the other side do not apply, as they are all cases of estates in severalty. It is said an equitable title is sufficient; and that the Court will compel the specific performance of a contract to purchase. I say the Court never has compelled it, because the Court will not compel the purchase of a chancery suit. Even in the case of an equity of redemption, the vendor is obliged to obtain the re-conveyance; he must complete his own title. Here the creditors of *Jacques* may come upon the estate; it does not signify whether they will succeed in any suit they may bring, the expence will be incurred, and the Court will not compel a purchaser to complete a purchase, which may involve him in such an expence.

Lord Commissioner *Eyre*.—Was not this the point discussed on the former occasion? The decision on the former exception seems to have decided the present case.

This kind of power must be construed with the utmost liberality, because it is a power to meliorate the estate; the idea of the law is, that a partition is a melioration of the estate, as giving a divided, for an undivided share, is a melioration. Upon the word *sell*, I should think the trustees should have a power of making partition (5); because in effect it is to take a quite new estate. It is difficult to say whether it was in the contemplation of the parties that they should have such a power. Then the question is, whether the words are large enough to warrant this exercise of it.

Lords Commissioners *Ashhurst* and *Wilson* thought there was no great difficulty in the question, and that it was not necessary that the parties should have had an exchange in their contemplation; as their general intention was to meliorate the property: they thought whatever power might be derived from the word *sell*; the other words of the power, *convey for an equivalent*, were sufficient. But, as a purchaser was concerned, it might be proper to consider the matter further.

As to the other matters the Lords Commissioners concurred in thinking that there must be an indemnity given.

[\*] The exceptions therefore stood over, and, just before the Lords Commissioners went out of office, they declined giving judgment in the cause.

And, now, coming on before the Lord Chancellor, Mr. *Solicitor General* and Mr. *Nedham* supported the exceptions, and Mr. *Attorney General*, Mr. *Mansfield* and Mr. *Stanley*, the Master's report, by much the same arguments as they had used before the Lords Commissioners.

At the close of the argument, Lord Chancellor gave judgment to this effect.

(4) See notes (1) and (2) *antea*, referring to 11 Ves. 476. and 1 Madd. Rep. 425, 426.

(5) *M'Queen v. Farguhar*, 11 Ves. 467, &c. is a direct decision against this proposition. *Vide ibid.* 473, &c., et *antea*, note (1).

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against  
HEATHCOTE.

[\*284]

[\*285]



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*Abt.*  
*ngines*  
HARRISON.

Lord Chancellor.—

I think a partition was clearly *within the idea of the parties*, because they meant to sell the estate in parts. The effect of a partition was precisely the same as to their interests.

If the estate had been sold to a trustee, and purchased again in shares, it would have been within the very words of the deed.

The objection made by a very respectable conveyancer seems to have been given up by him on further consideration.

They have divided the fee-farm rent; some provision must be made as to that.

And for this purpose, it was referred back to the Master. (6)

(6) The plaintiff was ordered to indemnify the defendant against so much of the fee-farm rent of 11. 10s. 1d. *per annum*, charged upon the said estate with other bonds, as exceeded the yearly sum of 10s. part thereof. As to the annuity, the Court ordered the plaintiff to purchase a short annuity of 70l. in the names of four trustees, to be named as follows: two to be named by the plaintiff, or two by the said defendant *Michael Heathcote*, to indemnify the said defendant *M. H.* against the annuity of 70l. *per annum*, payable to *C. E.* for her life, and charged upon the said estate, &c. R. L.

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[\*] EASTER TERM,

33 Geo. 3. 1793.

ALEXANDER, Lord LOUGHBOROUGH, *Lord High Chancellor*.  
Sir RICHARD PEPPER ARDEN, Knt., *Master of the Rolls*.  
Sir JOHN SCOTT, Knt., *Attorney General*.  
Sir JOHN MITFORD, Knt., *Solicitor General*.

WARDELL *against* WARDELL.

22d April.

(Reg. Lib. 1792. B. fol. 659. 664.)

Charge proportioned to the value of the estate.

LORD Chancellor said, that when portions are charged on estates, *to pay in equal rates and portions*, it means to be paid *pro rata* as to the value of the estates. (1)

(1) So decreed. R. L.

JANE TATE *against* HILBERT & al'.

MARY TATE *against* HILBERT & al'.

(Reg. Lib. 1792. B. folios 254. b. and 290. b.)

1793.

[Vide S. C. 2 Ves. jun. 111.]

*Littles' Hall*, 28th March.  
In Court.  
22d April.

A cheque on a banker given in a man's last illness is revoked by his death, unless before offered for payment, and is not good as a *donatio mortis causa*. (1)  
A promissory note in the last illness not a good *donatio mortis causa*.

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THESE were two bills filed by the respective plaintiffs for the payment of 1000*l.* payable upon a promissory note, to the plaintiff *Jane Tate*, and 200*l.* the value of a banker's cheque, payable to the plaintiff *Mary Tate* or order, given to the respective plaintiffs by their uncle *Mark Bell*, a few days previous to his death.

The bill of *Jane Tate* stated (*inter al'*), "That *Mark Bell* the plaintiff's uncle, some time in the year 1787, requested her to reside with him at *Battersea*, and superintend his household [\*] concerns; that, in compliance with his request, the plaintiff and her mother broke up housekeeping at *Scarborough*, and came to reside with him, and continued to do so till the time of his death; and that she and *Mary Tate*, the plaintiff in the other bill, great niece of the said *Mark Bell*, whom he sent for in 1787, had the principal care of his household concerns:

That the said *Mark Bell*, by his will dated 23d November, 1789, bequeathed to his sister the plaintiff's mother, 1500*l.*, and to the plaintiff *Jane Tate* 1000*l.*, and to *Mary Tate* the other plaintiff 500*l.* and the residue in trust for the benefit of his only child *James Bell* for his life, in manner therein mentioned, and appointed the defendants executors, giving them power to adjust and compromise and compound debts, and to pay debts, upon any evidence they should think proper:

That the testator, after the making his will, being sensible that his end was approaching, took frequent opportunities (when his state of health would admit of it) of looking into his affairs, and his papers, and securities for money, and making calculations of the value of his property and amount of his fortune, and of conversing with plaintiff thereon, and getting her to assist him therein; and when such calculations were finished, he mentioned to the plaintiff that he did not, when he made his will, think he was worth so much as his fortune then appeared to be, and that he would give plaintiff more, and would give more of his property away, for that there was too much for his son, and expressed an intention of cancelling several bonds and securities for money, which he had taken from several relations and friends for monies lent, and which securities he and the plaintiff had been looking over; and on the 25th of January, 1790, the testator being in his parlour, and conversing with plaintiff and the said *Mary Tate* on the statement of his affairs, he repeated his intention of giving away more of his property; and he, soon afterwards, cancelled bonds and securities from several of his friends and relations, to the amount of 3220*l.* which plaintiff, at his desire, took out of his bureau and delivered to him; and he then told the plaintiff, that he would give her 1000*l.* more, as he had told her he always intended so give her something more, and would give the said *Mary Tate* his great niece, 200*l.* more; and having observed that he had not money enough at [\*] his banker's to draw for both sums, and having filled up and signed to *Mary Tate* a cheque or draught on his bankers for 200*l.* payable to himself or bearer, he sent to one of his clerks for a proper

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(1) Upon this subject, see 1 Roper on Leg. pp. 1. 5. et seq., *Hill v. Chapman*, ante, 2 vol. 612., *Brown v. Burrow*, ante, 72., and *Cotteen v. Missing*, 1 Madd. Rep. 176. et seq.

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stamp for a bill or promissory note, and such stamp having been brought to him, he wrote thereon and signed the following promissory note, "I promise to pay Mrs. *J. Tate* or order on demand 1000*l.*, January 25th 1790, *M. Bell*;" and delivered the same to the plaintiff, desiring her to take care of it and to remind him of it when he next went to *London*, and he would give her the money:

That he had, at that time, in his banker's hands only 1142*l.* in cash:

That he died 30th *January*, 1790, and without having gone to *London*; and, therefore, did not pay the plaintiff the sum of 1000*l.* and the promissory note remained in the possession of the plaintiff:

That, on the 26th *January*, 1790, he added two codicils to his will, and by the first codicil he gave the plaintiff a pair of diamond ear-rings and his best diamond ring in trust for his son, to be delivered to him when his trustees should think him capable, and put him in the management of his own concerns; but in case he should never become capable in the judgment of his trustees, then the testator gave the same to the plaintiff, together with some other specific articles of value; and by the other codicil, he released the respective debtors whose securities he had previously destroyed:

That the defendants had refused to pay the plaintiff the 1000*l.* therefore the bill prayed payment thereof.

The bill of *Mary Tate* stated the same circumstances and prayed payment of the 200*l.* the value of the banker's cheque delivered to her by the testator on the 26th of *January*, 1790.

The defendants, by their answers, put the plaintiffs to the proof of the conversations which passed between them and the testator, respecting his encrease of fortune, and the destruction of his securities, and they said they believed that the testator did deliver [\*] the promissory note for 1000*l.* and the banker's cheque for 200*l.* to the plaintiffs.

They admitted assets, and stated, that, at the time the testator died, there was cash in his banker's hands to the amount of 890*l.* 2*s.* 5*d.*, and that on the 25th *January*, 1790, he was ill of the illness of which he died, as before mentioned.

They submitted that the cheque for 200*l.* was countermanded by the death of the testator, and that they were not liable to answer the same out of his assets; and as to the promissory note of 1000*l.* that, as the same bore date subsequent to the making of the will, and was for the same sum of money, as the legacy thereby given to the plaintiff *Jane Tate*, they submitted whether the same ought not to be considered as given in satisfaction of such legacy; and that they ought not to pay the same, it having been given voluntarily and without consideration.

The respective plaintiffs were, with other witnesses, examined in each other's cause; and the depositions proved the several circumstances stated in the bills and (among other things) that the testator, at the time of delivering of the promissory note and draught to the plaintiff was *infirm in his health*, but in his perfect senses; and though his memory might not be so good as in his younger days, yet that he knew every thing that he said and did; that he appeared to be in a fit state to dispose of his property; and particularly, that at the time of his destroying the several securities, and giving the promissory note, he said to the plaintiff *Jane Tate*, now I will give you 1000*l.* as I have often told you I would give you something more, meaning, as the deponent understood, more than he had given by the will.

The material argument turned upon the demand made by *Mary Tate's* bill.

Mr. *Solicitor General* and Mr. *Hollist*, for the plaintiffs, contended that this case came within the first definition of a *donatio causa mortis* by *Swinburne*, page 22. The testator's will was dated *November*, 1789; and

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and subsequent to that period, he looked into his affairs with a view of disposing of more than he had done by [\*] his will: this is a disposition in contemplation of death. *Lawson v. Lawson*, 1 Wms. 441., is applicable to the present case.

Mr. Mansfield and Mr. Campbell, for the defendants. This transaction cannot be brought within any definition of a *donatio causâ mortis*; it is a mere order to pay so much money, not an appointment of any specific sum; every legacy is an appointment to executors to pay so much; this is a mere order upon the banker, and cannot fall under such a description; the paper is not proved in the Ecclesiastical Court; it is only an immediate authority to receive a sum of money, and annihilated by the party neglecting to receive it in the testator's life time. In *Ward v. Turner*, 2 Vesey, 431., it is said that in *Lawson v. Lawson*, great stress was laid upon the draught being given for mourning; and that case stands upon its own peculiar circumstances. In *Miller v. Miller*, 3 P. Wms. 357. the note was held not to be a *donatio mortis causâ*; and, *à fortiori*, this cannot; for this expires with the life of the testator, which the other did not: delivery of the thing itself may avail, but not of the symbol, as in *Snelgrave v. Bailey*, 3 Atk. 214. Lord Hardwicke, thought delivery of the bond would not do: but that went upon the ground, that the bond itself constituted the debt; and therefore, in *Ward v. Turner*, he distinguished the case of a bond, from that of a note, which is mere evidence of a debt; and doubted whether he had not gone too far in *Snelgrave v. Bailey*; there is, therefore no case but *Lawson v. Lawson*, which proceeded on grounds which can never be supported, and has since been reprobated.

Mr. Solicitor General, in reply. If the plaintiff had paid away the draught, though the banker had refused payment, yet the holder might have recovered against the executors.

Lord Chancellor. —

My difficulty is how this can be *donatio mortis causâ*, it having no relation to the death of the testator.

Mr. Solicitor General. If given in general contemplation of mortality, it shall operate as such; and that though there is no proof of any particular illness at the time; it here appears the testator was in a very infirm state.

[\*] As to the claim of *Jane Tate*, Mr. Mansfield cited *Baldwin v. Webb*, 11th March 1788, decided by Lord Kenyon, then Master of the Rolls, in which he held that a promissory note would not be good, as a *donatio causâ mortis*.

As to the Solicitor's position, that the holder of the draft could recover, the case of *Pearson v. Wallis* before Lord Kenyon, was cited, as having decided the contrary, it being a mere voluntary note.

Lord Chancellor took time to consider: and on the 22d April following pronounced his decree.

Lord Chancellor. — There does not appear, either in the plaintiff's bills or the depositions, any circumstance of the immediate appearance of the death of the testator, at the time that the conversation passed between him and the plaintiffs, and the delivery of the cheque and promissory note. The whole of the transaction amounts to nothing more than this, a conversation between them as to the amount of his fortune, and upon his casting it up, its exceeding his expectations, his cancelling certain securities, and saying that he would give the plaintiff something more. Upon the 25th of January, when he gave them the draft and promissory note, according to the evidence, he appears to have been in a low state, but not in a dangerous way, and on the 30th he died; the date of his will was the 26th of November 1789, by which he gave several legacies to his relations, and among others, to the plaintiff *Mary Tate* 500*l.*; the day

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day after he had given the draft and note, he added two codicils, by the first of which he gave his niece some specific articles of plate and jewels, and by the latter, directs a release of the several securities which he had cancelled. Under these circumstances, the plaintiff, *Mary Tate*, claims the sum of 200*l.* upon the death of the testator. The cheque not having been tendered to the banker between the 25th and the 30th of *January*, the authority to pay clearly expired with the death of the testator at that period: and the doubt in my mind is, upon what ground this court can support her demand against the executors. The proceeding itself is perfectly fair and honourable; though, at the same time that, I must own that it is clear of the least imputation of undue management, it is liable to this observation, [\*] that the evidence by relations for one another, should be received with the utmost caution; as the allowance of such testimony might be attended with great inconvenience. The case itself is purely a mistake on the part of the person meaning to give it, as well as the party receiving it; for if the note had been paid away for a valuable consideration, and the money received at the banker's before notice of the death of the party, or immediately after, it might have availed; but for want of activity in the holder of it, it is become of no effect; one must allow one feels a disposition to make it effectual; but I must resist it, as it would be dangerous to decide the point under any particular bias. I cannot relieve the plaintiff. The claim has been supported upon this ground, that the delivery of the draft of 200*l.* upon the banker, may be considered as a *donatio causâ mortis*, as falling within the description of that particular species of alienation in *Swinburne*: that it operates as a disposition of so much money in the banker's hands, and in favour of the person put into possession of the note; and *Lawson v. Lawson* was cited for that purpose. On the other hand, it was said that it was a common cash note, and merely a *gift of so much money*; that she could not claim it as a legacy, nor would it be effectual as a debt, and that this court could not give greater effect to the note than at law. In all the numerous authorities upon this subject, the reasoning has been taken, with great propriety, from the *civil law*, as in the jurisdiction with respect to these points, the Ecclesiastical Court has followed the reasoning of the *Roman law*, and all the passages in *Swinburne* are borrowed from thence. Much perplexity has arisen from *Swinburne*, coupling the description of a *donatio* with a legacy, and taking his authorities partially from the civil law, at a time when the subject, among the lawyers at that period, raised a degree of contradiction; and it is difficult to reconcile the several passages; whether the subject is considered in the nature of a *donatio inter vivos*, or as one *mortis causâ*. *Swinburne's* three descriptions are these, 1st, where the party is in no present danger, but having the same idea of mortality which all men have, makes the gift with a general view to it; 2dly, where he does it, thinking himself to be in particular danger; and 3dly, where he does it in immediate contemplation of death, but only to take effect in case it happens. The two first are distinctions of *donationes causâ mortis*, which *Swinburne* has taken purely from the books which he refers to, [\*] and has arranged them under the names of donations, &c. and at a period when the controversy upon that matter among civilians was subsisting, he has taken his descriptions from Justin. Instit. Lib. 2. § 2. *de donationibus mortis causâ*: but had he looked further he would have found a correct opinion upon this subject, which at last prevailed as a legal authority; and that is contained in Justin. Lex 27. Digest. Lib. 39. tit. 6. L. *Si donetur mortis causâ ut nullo casu revocetur*. The original definition of a *donatio mortis causâ* was a gift in the nature of a legacy, and so called, *quia propter mortem*, liable to debts, and nothing more than a gift

gift upon survivorship; and the danger of suffering such donations to be taken loosely, occasioned a positive enactment that it should be attested by five witnesses.

Lord Hardwicke, in the case of *Ward v. Turner*, takes notice of the perplexity which has arisen from the confused definition among the civilians, but considers it as clearly understood by the law of the Ecclesiastical Court, that it cannot be an absolute gift, but only contingent upon the death of the party giving it; and he deems delivery to be the essential circumstance: here it cannot be considered in that light, for there has been no delivery of the thing, neither can it operate as a writing in the nature of an appointment: it is clear it cannot be paid, because there is no actual transfer of property. Had it been in the nature of an instrument, or a written direction to another to make the gift, it might be within the jurisdiction of the Ecclesiastical Court, and be proved by the executors; it would be void, however, against creditors, but would not necessarily fall within the course of an administration, nor require any thing to be done by the executors to constitute a title to the party to whom it was made. As to the doubt suggested in *Ward v. Turner*, respecting the authority of *Lawson v. Lawson*, upon looking into the Register's Book, the decision is right. It was not merely a matter of suggestion or proof, that the party intended the note for mourning, for it there appears that the note was actually given for that purpose, and that it was so indorsed, being admitted to be so by the answer of the defendant. The only question which could arise, was whether the note could be proved as a testamentary writing; and one does not well see what was the specific *ratio decidendi*; but it may be considered as a direction for mourning, and might have been given by parol, thought not inserted in the will, and not [\*] necessary to be proved in the Ecclesiastical Court; as taking the whole of the note and indorsement together, it was the appointment of a sum of money in the hands of the banker, for a particular purpose, expressed in writing, to take place provided the appointee survived the appointer. But with regard to the present case, I do not see how I can apply this idea of an appointment, for here the gift is to take effect immediately, and therefore cannot operate as a *donatio causa mortis*: the true ground is, that it must take effect in favour of the party surviving; but here is no reference whatsoever to the death of the donor. It cannot do so, but in case of death; but this is actually a draft upon a banker to take effect in his life-time; and it appears, by the evidence of the conversation held between the parties and the donor, that it was not intended as legatary, but he meant to give them an immediate bounty *simul & semel*; that he cancelled the securities from that moment, not from the time of his death; and at the instant he gave up the debts to the different persons interested in them, he gave the plaintiffs 1000*l.* and 200*l.* I see then no ground for calling this an appointment, when it is no more than an immediate delivery, without any reference to his death, or the survivorship of the donee. As to the promissory note, if she cannot avail herself of it at law, I lament the hardship; but I do not see how the Court can extend the case beyond the favour she could have at law; and as to the possibility of an action, if she could succeed, I should feel no sort of reluctance in establishing the demand here; but upon no solid ground of equity can I give the party relief, therefore, there is no use in retaining the bill.

Bills dismissed. (2)

(2) Without costs, and without prejudice to the plaintiffs bringing any action at law. R. L.

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[Vide S. C.  
2 Ves. jun. 122.  
128, &c.]

24th April.

Demurrer to  
bill for dower  
over-ruled,  
though it stated  
no impediment  
to succeeding  
at law. (1)

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# MUNDY against MUNDY.

(No Entry.)

**HUGH Mundy** the elder, being seised in fee of freehold estates, by will dated 26th November 1774, devised the same to his son *Hugh Mundy*, his heirs and assigns for ever, but in case of his death without issue, then he gave the same to his second son, the defendant in fee. The testator died soon [\*] after making his will, leaving his two sons surviving him, and *Hugh Mundy* the eldest son, became, by virtue of the will, seised of the premises, as tenant in tail by implication, and continued in possession thereof till his death, which happened on the 9th of April 1783; he died without issue, but leaving the plaintiff, his widow surviving him, and without having levied any fine, or suffered any recovery, and *Charles Mundy* the defendant, became seised in fee of the premises, subject to the plaintiff's dower.

The plaintiff, at some distance of time after the death of her husband, filed the present bill (in the time of the late Lords Commissioners) praying an account of rents and profits from the death of her husband, and that the defendant might be decreed to pay her one-third part thereof for her dower, and to have dower assigned to her out of the premises.

The bill did not state any term out-standing, or other impediment to recovering her dower at law.

The defendant put in a demurrer and answer to the bill, and for cause of demurrer insisted, that the defendant had no equity, and that her remedy, if any, was at law. By the answer, he admitted the facts, but said, the plaintiff had permitted him to remain in quiet possession of the premises for nine years, without any demand of dower, that he had offered to assign her dower from the time of her demand, but she had insisted upon having it from the death of her husband.

Mr. Lloyd in support of the demurrer.

The bill states no impediment to the plaintiff's proceeding at law, but a bill for dower must always state that the defendant has the title deeds in his custody, or that there is some obstruction to her remedy; dower is a claim at law, and if the doweress can recover there, she has no right to come into a Court of equity. She has no more right than an heir at law; both have legal rights. In *Curtis v. Curtis*, (ante, vol. ii. 620.) the Court retained the bill, and sent the case to law. There was an allegation, that the defendant knew the plaintiff had not the [\*] deeds. (2) So there was in *Moor v. Black*, Ca. temp. Talb. 126. This court has no original jurisdiction in cases of dower, 2 Bacon's Abr. 136. *Smith v. Angel*, 7 Mod. 43.

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But the demurrer was over-ruled, Lord Chancellor (3) saying, that where

(1) See expressly upon this, the Editor's notes upon *Curtis v. Curtis*, ante, 2 vol. 620., & 624. and 630. in particular; referring to *Watson v. Duke of Northumberland*, 11 Ves. 155.

(2) This part of Mr. Lloyd's argument and the cotemporary report of it also, 2 Ves. jun. 124., is quite unfounded in fact. The bill contained no such charges; the allegations of it referring to other matters. See the Editor's notes on it, ante, 2 vol. 624. and 630.

(3) See the judgment 2 Ves. jun. 128. The following is the note of the judgment, as taken by Lord Colchester: "Lord Chancellor. The demurrer is bad, because it is a demurrer to a bill for an account, but the answer is a repetition of the demurrer admitting the widow's right, and that an account is due. The proceedings at law would be nugatory to try a right which is admitted here, and upon the general question

where the title to dower is admitted, and nothing to be done but to assign it, there being nothing to try at law, it would be useless to send it thither,

"question there is no intricacy on the dower; if the right is controverted it must go to law, but if admitted, it is, of course, here, so it is in partition. In either case the parties have such an intermixture of right that it is best for the parties to have relief here. The course has been for many years to have commissioners here. In twelve years in the Common Pleas I only remember two writs of dower. Nothing is a bar to dower at law but a jointure; yet now it is daily practice to receive equitable bars here, and if plaintiff must go first to law and then be brought back here by defendant, it is only a circuitous and vexatious course." Lord Colchester adds the following note: "See suits in Chancery for dower, Year-book, 6 Edw. 3. 47."

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MUSEUM  
against  
MUNDY.

BROUGHTON *against* MARTYN.

(No Entry on this occasion.)

THE defendant was brought up on a *pluries habeas corpus*, and Mr. Sutton now moved, that he might be remanded, in order to be brought up again on an *alias pluries*.

The prisoner applied to the Court to be discharged, on going immediately to the public office, putting in his answer, and clearing his contempts.

Mr. Sutton objected to this, as the costs were not ascertained, and contended, he should have given notice of his intended application to the Court, and that then they should have ascertained the costs.

But it being agreed that the costs would not exceed 15*l*.

Lord Chancellor said, he would not re-commit the defendant, but discharged him on the terms of depositing 15*l*. for costs, subject to the Master's taxation, and putting in his answer immediately.

(1) See the Editor's notes on these points in *Wallop v. Brown*, *antea*, 212. 224.

13th May.

Practice.

Defendant in contempt, discharged (1), on putting in an answer and depositing the utmost sum to which costs would amount, subject to taxation.

## [\*] TRINITY TERM,

[\*297]

33 Geo. 3. 1793.

The Duke of BOLTON *against* MARY CHARLOTTE WILLIAMS and Others.

[*Vide* S. C.  
2 Ves. jun. 138.]

(Reg. Lib. 1791. B. fol. 329. and Reg. Lib. 1792. A. fol. 385.)

7th June.

IN *Easter* Term 1790, the plaintiff filed his bill of interpleader, against the defendants, thereby stating that by indenture dated 10th of June, 1765, and made between the late Duke of Bolton, brother of the

The memorials of grants of annuity must set out all the

securities, and the whole transaction. So, of assignments of parts of an annuity already granted. (1) Where this is not the case, the Court would not order a return of the purchase-money, out of arrears in court. (2)

[Interpleader. — On bill of interpleader by the owner of an estate against the grantee of a rent-charge out of it, assigned to secure an annuity, and the annuitant, the annuity being void, the arrears of the rent-charge in court were paid to the original grantee; and the annuitant was held not entitled to have the consideration repaid out of that fund, there being only a general debt at law, and no lien. (3)]

(1) *Vide Davidson v. Foley*, and *Jackson v. Lever*, *antea*, 3 vol. 598. 605, &c., *Hood v. Bretton*, *antea*, 121, &c., *Bromley v. Holland*, 7 Ves. 1. *et seq.*, *Angell v. Hadden*, 2 Meriv. 160. *et seq.*, &c.

(2) See notes (2) and (3) next page.

O 2

plaintiff,



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Duke of  
Bolton  
against  
Williams.

plaintiff, and *William Law* gentleman, for making a provision for the defendant *Mary Charlotte Williams*, (therein called *Mary Charlotte Thornhill*,) the said Duke demised unto the said *William Law*, &c. certain estates, and premises therein mentioned, for a term of 99 years, upon trust to permit the Duke and his assigns to hold the premises, and to take the rents, &c. for life, and after his decease, in trust to pay unto the said *Mary Charlotte Williams*, and her assigns during her natural life, a clear annuity as therein mentioned of 300*l.*, which annuity was not to be subject to the control, &c. of any husband with whom she might afterwards intermarry:

That the said Duke of Bolton died, and, some time after his death, the said *Mary Charlotte Thornhill* intermarried with the said defendant *John Williams*, and afterwards by a decree of this Court, dated 12th of December, 1768, it was declared that the before mentioned indenture ought to be established, and the trusts thereof performed, and that the estates were charged with the payment of the said annuity of 300*l.*, for the separate use of the said *Mary Charlotte Williams*:

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That the defendant *Mary Charlotte Williams*, by indenture, dated 10th of October, 1778, purporting to be for a valuable [\*] consideration, assigned to *Isaac Ardesoif* the whole of the said annuity of 300*l.* in trust to take to his own use 100*l.* per annum, part thereof, and afterwards, by another indenture, dated 24th of December, 1778, assigned to him for his own use 60*l.* per annum, other part of said annuity of 300*l.*; and by an indenture dated the 3d of May, 1780, she assigned to *Richard Du Bourg* 90*l.* per annum, other part of said annuity:

That by an indenture of four parts, dated 22d of September, 1781, made between the said *Isaac Ardesoif*, the said *Richard Du Bourg*, said *Mary Charlotte Williams*, and *Thomas Estcourt Creswell* deceased, it was witnessed that, in pursuance of the agreements therein mentioned, and in consideration of 1126*l.* 7*s.* paid by said *Thomas Estcourt Creswell*, to said *Isaac Ardesoif*, and of 534*l.* to the said *Richard Du Bourg*, and of 399*l.* 13*s.* to the said *Mary Charlotte Williams*, making in all 2000*l.* the said *Isaac Ardesoif*, *Richard Du Bourg*, and *Mary Charlotte Williams*, did assign unto said *Thomas Estcourt Creswell*, &c., the said several annuities of 100*l.*, 90*l.*, and 60*l.*, during the life of the said *Mary Charlotte Williams*, out of said premises so demised by the said late Duke of Bolton, to the said *William Law*, &c., for said term of ninety-nine years, upon trust, out of said annuity, of 300*l.* to deduct and pay to himself an annuity of 250*l.*, and pay the residue of said annuity of 300*l.* to the said *Mary Charlotte Williams*, or her assigns, and appointed *Creswell* her attorney, to receive the annuity of 300*l.*:

That *Creswell* died the 14th of November, 1788, having first made his will, dated about 14th of January, 1786, and appointed the defendant *Mary Jenkins* sole executrix, who duly proved the same.

And the bill further stated, that, by indenture dated 20th of March, 1782, made between the said defendant *Mary Charlotte Williams* and *William Sampson*, since deceased, in consideration of 297*l.* 10*s.* the said defendant *Mary Charlotte Williams* assigned the rent-charge of 300*l.* to the said *William Sampson*, &c. upon trust, to retain during the life of the said defendant *Mary Charlotte Williams*, an annuity of 42*l.* 10*s.* and his costs and expences, and to pay the residue to the said defendant *Mary Charlotte Williams*, and she thereby nominated the said *William Sampson*, her attorney, to receive the said annuity, with usual powers

(2) See this part of the judgment in Mr. Vesey's report, p. 156., *Jones v. Harris*, 9 Ves. 486., *Ex parte Wright*, 19 Ves. 255. 259., and *Angell v. Hadden*, 15 Ves. 244., 16 Ves. 202., and 2 Merivale, 164. 169. &c.

(3) See within, and the marginal abstract in 2 Ves. jun. 139., with *Angell v. Hadden*, 15 Ves. 244. *et seq.* 16 Ves. 202, &c.

and

and authorities: and stated the death of the [\*] said *William Sampson*, having first made his will, and appointed defendants *Down* and *Pitches* executors, who had proved the same; and the death of *Law*, having first made his will and appointed the defendant *John Anderson* executor, who had duly proved the same:

The bill further stated, that the plaintiff was in possession of said estates, as tenant for life, under the will of *Charles* duke of *Bolton*, subject to said rent charge of 300*l.*, and that various disputes and differences having arisen between *Mary Charlotte Williams*, *Thomas Estcourt Creswell*, *William Sampson*, and defendants *Jenkins*, *Pitches* and *Down*, and plaintiff having paid said 250*l.* a-year, up to *Christmas*, 1787, and that said annuity, on account of such disputes and differences, was from that time in arrears, and plaintiff having paid 50*l.* the remaining part of said annuity of 300*l.* up to *Christmas*, 1783, and same on such account was in arrear since that time:

That defendant *Mary Charlotte Williams* exhibited her bill against plaintiff, and the executors of said *William Sampson*, to have the aforesaid indenture of the 20th of *March*, 1782, cancelled, which bill had been dismissed with costs, as against the executors of the said *William Sampson*, and that the defendant *Mary Jenkins* had also exhibited her bill against plaintiff and defendant *Mary Charlotte Williams* and others, praying that the plaintiff might be decreed to pay the said annuity of 250*l.* a-year, and the arrears thereof to her; and that the defendants *Down* and *Pitches*, since the aforesaid bill had been dismissed, had demanded the arrear of the said annuity of 42*l.* 10*s.* per annum, and the punctual payment in future, threatening, in case their said demand was not complied with, to file a bill against the said plaintiff; and that the said *Mary Charlotte Williams* (alleging that upon the hearing of the aforesaid cause, the then Lord Chancellor had declared, that it was his opinion, that she alone was intitled to receive the said annuity) had caused a notice to be served, demanding payment of the arrears of the said annuity, and had also caused declarations in ejectment to be served, in the name of the defendant *John Anderson*, on the plaintiff, in order to recover the possession of the said *Yorkshire* estates; that the plaintiff had offered to pay the said arrears to the defendant *John Anderson*, the personal representative of the said *William* [\*] *Law*, but he had refused to accept the same, and had permitted the defendant *Mary Charlotte Williams*, or the other defendants, to use his name in bringing ejectments for recovering the said estates:

The bill also stating that the defendant *John Williams* resided abroad, prayed that the defendants might interplead, thereby offering to pay the arrears into Court, and for an injunction to restrain the defendants from proceeding in ejectment, or otherwise at law, against the said petitioner or the tenants of the estates.

The defendant *Mary Jenkins*, by her answer put in to the said bill, stated the particulars of the indentures whereby the several annuities of 100*l.*, 60*l.* and 90*l.* (making together 250*l.*) were granted by the said *Mary Charlotte Williams*, out of the annuity of 300*l.* to the said *Ardesoif*, and *Du Bourg*, and which were afterwards assigned to *Creswell* her testator, and claimed to be entitled to the several annuities, and to be paid the arrears thereof accordingly.

The defendants, *Down* and *Pitches*, by their answer, stated, that *Mary Charlotte Williams* having sold 250*l.*, part of her said annuity, of 300*l.* to *Thomas Estcourt Creswell*, and being desirous of selling the remaining 50*l.* a-year for her life, applied to the said *William Sampson* to become the purchaser thereof, and that he agreed to purchase 42*l.* 10*s.* a-year, for the sum of 297*l.* 10*s.*, being after the rate of seven years' purchase, (but as the defendants believed, *Sampson* was not apprized of the grant of

1793.

Duke of  
BOLTON  
against  
WILLIAMS.  
[\*299]

[\*300]

1793.

Duke of  
BOLTON  
against  
WILLIAMS.

[ \*301 ]

of the prior annuities, to the amount of 250*l.*), and that in consequence thereof, the said indenture of the 20th of *March*, 1783, was made and executed, and stated the purport thereof, and further stated that a memorial of the said indenture was duly enrolled under the act of parliament, and said that it appeared by the evidence in the said *Mary Charlotte Williams's* said cause, that the said indenture was prepared by the person employed in the behalf of *Mary Charlotte Williams*, and it appeared to them, by an entry in the said *William Sampson's* banker's book, that the said consideration money of 297*l.* 10*s.* was paid by him to the said defendant *Mary Charlotte Williams*, by draft on his banker, also that the said *William Sampson* received three [\*] several quarterly payments of 12*l.* 10*s.* each, as for three quarterly payments of his said annuity, and for his salary of 6*d.* in the pound, on the receipts of the said rent charge of 300*l.*, and also received the sum of 15*l.* 5*s.* in respect of the said annuity from *John Bindley*, Esq. who was surety by bond, with the said *Mary Charlotte Williams*, for the due payment of the said annuity, which they believed was the whole money which was received by the said *William Sampson* in his life-time, on account of the said annuity, and that the defendants had not received any payments in respect of the said annuity: that the whole thereof, except the said sum of 52*l.* 15*s.* was then in arrear, and they claimed, as the executors of the said *William Sampson's* will, to be intitled to receive the arrears of the said annuity of 42*l.* 10*s.* out of the money which was in the plaintiff's hands at the time of filing his said bill, and also to be paid the growing payments of the said yearly rent charge of 300*l.* during the life of the said defendant *Mary Charlotte Williams*.

The defendant *Mary Charlotte Williams*, by her answer to the said bill, amongst other things admitted the making and execution of all the instruments stated in the plaintiff's bill, but said that the same were executed by her when in great distress, and under the circumstances therein aftermentioned, and she insisted that she, only, was entitled to receive the arrears of the said annuity, of 300*l.* for which she had only given receipts to *Christmas*, 1783, from which time, she insisted the same was in arrear: she insisted that the late Duke intended the said annuity for her separate use, and that no other person should have any controul over it; and stated that, by her marriage settlement with her husband, it was settled to her separate use. She further stated the circumstances under which the annuities to *Ardesoif*, *Du Bourg* and *Creswell* were granted, much as they appeared in evidence, and insisted that the defendant *Jenkins* was not entitled to receive the arrears thereof; and also insisted that she was greatly deceived throughout the transactions, relating to *Sampson's* annuity, in the manner stated by her in the bill which she exhibited against the plaintiff and the defendants *Down* and *Pitches*, as executors of *Sampson*, by which bill she prayed that the defendants *Pitches* and *Down* might be compelled to deliver up the said indenture of the 20th *March*, 1783, to her to be cancelled, as being obtained from her by fraud and imposition, and without due [\*] consideration, and offered to pay to the said defendants all the money received by her from *Sampson*, as the consideration of the said indenture, together with lawful interest, after a deduction of what had been received by *Sampson* in his life-time, or by the defendants, his executors, since his death; and the said defendant admitted, that the said bill had been since dismissed without costs, against the said defendants; and she further admitted that the defendant *Jenkins*, had exhibited her bill against the plaintiff and defendant.

[ \*302 ]

Witnesses were examined; and, as the final decision of the cause turned upon the difference of the facts which came out in evidence, and the statement thereof in the memorials enrolled in this court, it will be necessary,

necessary, in order to make the argument and judgment intelligible, to state so much of the evidence, and memorials as apply thereto.

As to the annuities granted to *Ardesoif* and *Du Bourg*, the grants thereof, and the payment of the consideration were proved; and as to the assignment to *Creswell*, *Bindley* swore, and was supported in the material parts by other witnesses, that *Powel* being employed by *Creswell* to lay out a sum of money in the purchase of annuities, caused advertisements to be published in the papers for persons desirous to sell; and that *Bindley*, on behalf of *Mary Charlotte Williams*, applied to him, to procure her a purchaser for an annuity of 250*l.* part of the said annuity of 300*l.* stating to him that *Ardesoif*, who had annuities of 100*l.* and 60*l.* granted out of the same, had agreed to take back his purchase money with lawful interest, and it was agreed that *Creswell* should purchase such annuity of 250*l.* at the price of 2000*l.*; that *Powel* informed him, that *Jenkins* the agent of *Creswell*, was in town, and insisted that *Palmer* should be employed to prepare the draft of the deed relating to the purchase of the said annuity, that the deed being prepared, *Ardesoif*, with *Balfour*, his attorney, *Du Bourg*, and his attorney, *Powel*, *Jenkins*, and *Palmer*, with *Mary Charlotte Williams* and the deponent met at *Powel's* chambers, when *Ardesoif* refused to take back his purchase money with lawful interest, and insisted on being paid the arrears of his annuity and his purchase money, which *Mary Charlotte Williams* from the pressure of her circumstances, was obliged to comply with; and accordingly [\*] that *Ardesoif* was paid the whole of his purchase money, and the arrears of his annuity to that time, and *Du Bourg* was also paid a sum of money which he claimed to be due to him, that *Balfour* demanded the sum of 15*l.* which was paid to him, and *Palmer* produced a bill of 31*l.* or thereabout for preparing the deeds, which *Mary Charlotte Williams* objected to pay, saying that she had 80*l.* to pay to *Powel*, who was the only person employed by her; upon which *Jenkins* insisted upon *Palmer's* being paid out of the purchase money for the said annuity, which was accordingly paid, and that all these sums were paid out of the 2000*l.* purchase money for the annuity; that the deed was at such meeting executed by *Mary Charlotte Williams* and the other necessary parties, and that, after all the parties, except *Powel*, *Mary Charlotte Williams*, and the deponent had left the room, *Powel* called in a man of very shabby appearance, to whom *Powel* told *Mary Charlotte Williams* she was to pay 80*l.* or guineas, which she paid accordingly; and that the sums of 1126*l.* 7*s.*, 534*l.*, 15*l.*, 31*l.* 7*s.* 6*d.* amounting together to the sum of 1706*l.* 14*s.* 6*d.* being deducted out of 2000*l.* the said purchase money, there remained the sum of 293*l.* 5*s.* 6*d.* out of which *Mary Charlotte Williams* paid the said sum of 80*l.* or guineas, to the man whom *Powel* called in.

With respect to the transaction as to *Sampson's* annuity, *Powel* swore that *Mary Charlotte Williams*, or *Bindley* on her behalf, applied to him to procure a purchaser of an annuity of 50*l.*, being the remainder of the said annuity of 300*l.*, and that *Sampson* agreed to purchase an annuity of 42*l.* 10*s.*, part of the said annuity of 50*l.*, on condition that the whole annuity of 300*l.* should be issued to him, in trust to receive the whole thereof, and to pay *Creswell* the annuity of 250*l.*, and afterwards to take to himself the annuity of 42*l.* 10*s.* and also to retain the remainder of the said annuity of 300*l.* for his trouble and expence in receiving the said annuity of 300*l.* and that he (the witness) prepared an assignment of the annuity of 300*l.* from *Mary Charlotte Williams* to *Sampson*, which was executed, and the purchase money to the amount of 297*l.* was paid to *Mary Charlotte Williams* by *Sampson* at the time of the execution thereof, and that *Mary Charlotte Williams* thereout paid to the deponent

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[ \*303 ]

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Buckingham  
v. Williams.*  
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32*l.* 10*s.* 6*d.*, or thereabout, for his demand, [\*] and afterwards paid thereout of *Woburn* 1*l.* for commission thereon.

H. The material parts of the memorials are as follows:—

1. Memorial of the annuity granted to *Creswell* by the Duke of Bolton.

"An indenture, &c. made between, &c." "it is witnessed that *Mary Charlotte Williams*, in consideration of 1126*l.* 7*s.* paid to the said

*Isaac Ardesoif*, and 534*l.* to the said *Richard Du Bourg*, both which

sums were paid to the said *Isaac Ardesoif* and *Richard Du Bourg*

by the order of the said *Mary Charlotte Williams*, and of the further

sum of 339*l.* 13*s.* paid to the said *Mary Charlotte Williams*, which

said several sums make the sum of 2000*l.* and were paid by the said

*Thomas Estcourt Creswell*, in notes of the Bank of England, did grant

unto the said *Thomas Estcourt Creswell*, an annuity of 1250*l.* for her

life, and for better securing the payment thereof did assign unto the

said *Thomas Estcourt Creswell*, an annuity of 300*l.* granted unto the

said *Mary Charlotte Williams*, by the late Duke of Bolton, deceased

upon his estate in the county of York.

2. Memorial of *Sampson's* annuity.

An indenture bearing date, &c. between *Mary Charlotte Williams*

(late *Mary Charlotte Thornhill* spinster,) wife of *John Williams* of the

parish of *St. Margaret Westminster* of the one part, and *William*

*Sampson* of London, merchant, of the other part, assigning to her an

annuity of 300*l.* per year, payable to the said *Mary Charlotte Thorn-*

*hill*, during her life, charged upon the castle of *East Balton* in the

county of York, &c. In trust to pay himself an annuity of 250*l.* 10*s.*

during the life of the said *Mary Charlotte Thornhill*, now *Mary*

*Charlotte Williams*, granted by the said *Mary Charlotte Williams* to

the said *William Sampson*, for and in consideration of 297*l.* 10*s.* paid

to her in notes of the Bank of England, and of a bond and warranty

of attorney confessing judgment from *John Bindley*, Esq. to guarantee

the said annuity."

It appeared, in evidence, that this payment was by a draft on a

banker, but paid by him in Bank notes and cash.

This cause was heard before Lord Thurlow, in 1791 when,

[\*] Mr. Solicitor General (Scott) and Mr. Holist stated the transac-

tions with respect to the annuities, and the manner of payment of the con-

siderations, as stated before in the evidence; and that Mrs. Williams

insisted that the transactions were void,

1*st.* In respect of her interest in the annuity granted to her by the

late Duke of Bolton; which, she insisted, was a provision, to be paid to

her from time to time, for her maintenance, and therefore could not be

anticipated, and the whole interest disposed of at once; that this had

been the tendency of his Lordship's opinion in *Ellis v. Atkinson*, (ant.

vol. iii. p. 565.) and *Pybus v. Smith*, (*ibid.* 340.) that a married woman

to whom such a provision was granted could not grant it away.

2*dy.* That the memorials inrolled were wrong. The act requires

that every deed or instrument by which the annuity is secured shall be

set forth, and the consideration shall be truly described.

As to *Creswell's*, the consideration was said to be paid in this way;

1126*l.* to *Ardesoif*; 534*l.* to *Du Bourg*; and 339*l.* 13*s.* to *Mary Char-*

*lotte Williams*; no mention is made of the payments to *Powell*, *Balfour*

or *Palmer*; and the payments are stated to be in notes of the Bank of

England, which could not be in these broken sums:

[\*305]

money, *Wright v. Reed*, 3 Term Rep. B. R. 554., but the payment must be set forth to be in Bank notes, *Rumbul v. Murray*, 3 Term Rep. B. R. 298. Here the payment was by a draft on a banker, who paid it in Bank notes and cash.

Mr. Mansfield, Mr. Lloyd, Mr. Mitford and Mr. King, for the representatives of *Creswell*, and *Sampson*, contended, in the first place, Mrs. Williams's interest in the annuity was such as she could part with. The grant of the annuity to her, was not made when she was a married woman: in the case of an annuity so granted, there might be some pretence to say it was for maintenance. [\*] But here it was before her marriage, and to be free from the debts or controul of her husband. The clause that her receipt alone should be a discharge was only to render the husband's receipt unnecessary. If Mrs. Williams had sold this annuity previous to her marriage, the purchaser would have been safe. In *Allen v. Papworth*, 1 Ves. 163. *Grigby v. Cox*, *ibid.* 517. *Halme v. Tenant*, (*ante*, vol. i. p. 16.) *Biscoe v. Kennedy*, (cited there,) and a great many other cases, a married woman entitled to separate property has been held, as to that property, to be a feme sole. It is so as to property left to her by will to her separate use, and she may by one act dispose of the whole, and it is the same thing with an annuity as with other separate property.

Then, as to the memorials, this was an assignment of an existing annuity, not a new grant; it is the mere departure with the annuity to another person, and is therefore materially different from a grant of an annuity. The act of parliament only applies to fresh annuities, and never has been held to extend to assignments; assignment of part of the dividends of stock, was held, at the Rolls, not to be within the act. And the court will not extend a penal act.

But, if it was necessary to enroll memorials, the particulars, here, are not forth; it is objected, the warrant of attorney is not mentioned in the memorial, but this was not necessary; if bad, it only avoids that security, and does not affect the others; it is only an authority, by which the party can, the earlier, obtain judgment. It is true, in reciting the consideration, the words in notes of the Bank of England were added, but those words are mere surplusage; the case of *Wright v. Reed* shews that it is the same thing whether the money is paid in cash or Bank notes.

Mr. Solicitor General in reply.

It is argued that this is not a grant of an annuity but only an assignment; and that, in a case of dividends of money in the funds, it has been held not necessary to enroll the grant; but that arises from the exception in the act of parliament: but in other cases, this point of its being an assignment, has been determined in the King's Bench, to require enrolment; every assignment amounts to a new grant of an annuity. The [\*] defect of the warrant of attorney being recited in the memorial, has been also held to be fatal: as to its only affecting the instrument which is not recited in the memorial, that has been determined otherwise. With respect to *Sampson*, his retaining 7l. 10s. for receiving the annuity of 800l. falsifies his memorial, as in fact he was to have 50l. a year, not 42l. 10s.

Lord Thurlow expressed great doubt upon both points, and did not give any judgment in the cause till the 24th May 1792, when he sent the judgment, in writing, to the Register's office, whereby he declared that the deeds dated the 22d of September 1781, and 20th of March 1782, under which the defendants *Pitches* and *Down*, and *Mary Jenkins* the executrix of *Thomas Estcourt Creswell*, claim, were void for want of the enrolment of proper memorials thereof; and referred it to the Master to take an account of the arrears, and ordered that the same (subject to the costs of the plaintiff, and *Anderson* the trustee) and the

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Duke of  
Borough  
against  
Widdows

[ \*306 ]

[ \*307 ]

1783.  
  
 Duke of  
 Bolton  
 against  
 Williams.

growing payments should be paid to *Mary Charlotte Williams*, and the injunction to be perpetual against defendants *Pitches* and *Down*, and *Mary Jenkins*, and to be continued against defendants *John Williams*, *Mary Charlotte Williams*, and *Anderson*, till further order. The defendants *Pitches* and *Down* and *Mary Jenkins* presented petitions of rehearing to the late Lords Commissioners, but it did not come on during their time. The cause came on to be reheard before the present Lord Chancellor on the 3d of June.

Mr. Solicitor General, Mr. Mansfield, Mr. Lloyd, and Mr. King, for the appellants, argued to much the same purpose as before, in support of the memorials; and cited the case *Ex parte Chester*, 4 Term Rep. B. R. 694. to shew that it was not necessary that the warrant of attorney should be mentioned in the memorial, as being only a collateral security.

They now argued a completely new point, not made at the former hearing, that if this annuity were void for want of proper memorials having been enrolled, their clients ought to be repaid their purchase money out of the arrears in court; they insisted the decree was erroneous so far as it had ordered the [\*] arrears to be paid to Mrs. Williams, instead of being paid into court: that, on the general principle of equity, a person who comes into this court to get rid of a security, must do equity: that if Mrs. Williams had not been a party, the transaction between *Ardesoif*, *Du Bourg* and *Creswell*, would have been a good assignment: the grants to *Ardesoif* and *Du Bourg* were unimpeached, and *Creswell* had a right to stand in their place: that if Mrs. Williams was not a married woman, an action at law would lie to recover the purchase money, *Shove v. Webb*, 1 Term Rep. B. R. 792. *Stratton v. Rastall*, 2 Term Rep. B. R. 966.; that therefore this court having the fund in its hands, would, to avoid circuity, pay it out, and not put the appellants to a suit at law, which, from the circumstance of Mrs. Williams being a married woman, they might not be able to maintain. By her bill, she has offered repayment.

Mr. Attorney General, Mr. Hardinge, Mr. Graham, Mr. Nedham, and Mr. Hollist, cited *Hopkins v. Waller*, 4 Term Rep. B. R. 483. *Stevenson v. Oslade*, *ibid.* 824. and *Davidson v. Foley*, 2 Term Rep. C. B. 1240 shew that it was absolutely necessary, that the warrant of attorney should be stated in the memorial.

As to the equity of repayment, they admitted that the plaintiff could not come here, without doing equity; but contended that Mrs. Williams was not a plaintiff, seeking to set aside a security: she was merely brought here against her will, by the Duke, who sought to know to whom he was to pay. The offer was made by Mrs. Williams, in the bill filed by her against *Pitches* and *Down*, to set aside the conveyance for fraud and imposition, which bill was dismissed; but she made no such offer now; a court of law could not have ordered a return of purchase money, in this case, because it considers the whole transaction void, and not giving a lien on any fund.

Lord Chancellor gave judgment to the following effect. (4)

I have not the least doubt upon the subject: I am clearly of opinion, the decree is right in all its parts.

It is a bill of interpleader, filed by the Duke of Bolton, as to the annuity granted by the late duke, to *Law* in trust for [\*] Mrs. Williams: that circumstance alone makes it necessary to come here, as there is an equitable estate: as to all the rest the rights are legal. The duke was liable to be called upon by Mrs. Williams, and she having made assignments of her annuity, and the assignees setting up claims to it,

(4) The report of the judgment, 2 Ves. 341, is much preferable.

and it necessary for the duke to come here, to know whether these assignments are legal. The plaintiffs call upon the parties to make out their claims; so that each party defendant is to stand on his own right and the validity of his claim.

And first as to *Creswell*; his claim is under a purchase of 250*l.* a year, by deeds to which *Mrs. Williams* is a party; with several other persons she is bound to make out that the original grant was good, and that the memorial was sufficient. The statute requires the memorial to set out the whole consideration, and by whom, and to whom paid; and I differ from what has been argued, for I think the actual mode and manner of the payment is necessary. It states the transaction very shortly. (His Lordship here read the memorial.) The objections to this memorial are plain; by the act of parliament it is to set forth the consideration fully and clearly; and it is not matter of surplage to set forth the names of two persons, where two are concerned in the payment. The whole *res gesta* is to be set forth. And, upon the evidence, the real transaction contradicts the mode of payment stated in the memorial. It appears by the evidence, that former annuities had been granted to *Ardesoif* and *Du Bourg*, that these were to be purchased by *Creswell*, and to be confirmed by *Mrs. Williams*; and the deed contains assignments from *Ardesoif* and *Du Bourg*, and a further grant from *Mrs. Williams*; and the manner of the transaction was, that *Ardesoif* and *Du Bourg* were paid their demands, and *Mrs. Williams*, instead of being paid the sum stated in the memorial, was actually paid only 213*l.* for 80*l.* was paid out of her money to *Powel*; 15*l.* to *Balfour*; and 30*l.* to *Palmer*. There is no evidence of an agreement between *Mrs. Williams* and *Creswell*, that she should pay his agent; so *Palmer's* charge was *Creswell's* debt, not *Mrs. Williams's*. Is it possible for any body reading this memorial, to know that there were two prior subsisting annuities, and to divine the other payments? Instead of the transaction being fully set forth, it is stated falsely. If *Palmer* was paid in consequence of an agreement [\*] between *Mrs. Williams* and *Creswell*, that ought to have been set forth. The account given by the memorial is so different from the real transaction, that, if this memorial were sufficient, it would be necessary to repeal the act, for its only effect would be to give a false colour to these transactions. With respect to *Palmer*, it was a deduction for the benefit of *Creswell*, and *Mrs. Williams* received 2000*l.* minus what ought to have been paid by *Creswell*; therefore I am of opinion that the annuity is void for want of a proper memorial.

With respect to the other annuity (*Sampson's*) the memorial recites the annuity to be only 42*l.* and it does not state all the securities, for with respect to the bond and warrant of attorney, as it does not state the dates, it is as no memorial.

But it is said to have been determined in the Court of King's Bench, that the defect of the memorial will only vitiate the particular security so mis-recited; but I have enquired, and am informed no such idea was thrown out; though the court could go no further than the application before them: although where their own process is made the means of a conveyance, they can take notice of it upon motion. The act requires that a memorial of every deed, bond, instrument, or other assurance, whereby any annuity or rent-charge shall be granted or assured, shall be enrolled, and shall contain the day of the month, and the year when the deed, &c. bears date. It requires that every deed shall be set forth. It is impossible to put it in stronger terms, than that every deed shall be set forth, because they all make one security. The word *such* in the subsequent part, can refer only to this. It is the only grammatical or legal sense of the word. The

defect

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[ \*310 ]



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Williams.

defect here is in not setting forth the warrant of attorney. Suppose the security to consist of a bond, warrant of attorney, and judgment; and the bond was void, as not being recited; could the judgment be good? Suppose it was secured by a demise? Could the other parts of the security be good? The act declares the whole to be void. A defective memorial affects the whole transaction. Then, over and above the 42l. 10s. *Cresswell* is to receive 7l. 10s. for receiving the 860l. a-year: his only business was to receive his own annuity; what business had Mrs. Williams to pay him for receiving the other part of the money? It was a mere shift to avoid the law.

[ \*311 ]

[\*] Then as to the consequence of the grants of the annuities being void. *The annuities being void, they cannot recover upon them*(5); but it is said they have paid their money, and that actions have been maintained for money paid for void annuities. Then the grantees must bring actions, in which they will either succeed or not. If they succeed, I have no right to stop the money, because the Duke comes here to ask of the Court to whom the annuities are to be paid. Mrs. Williams is only brought here to know, whether the annuities are to be cut down upon legal objections. I have no more right to interfere than if the demand were for money lent and advanced. I have no right to enquire into her liability to pay. If they are not able to make good their title at law, what equity arises? If they do not succeed on account of her being a married woman, what right have I to take away any legal defence she may have, in this suit? I am only to tell the Duke that he cannot pay the assignees the money, that they have no lien(5); the consequence is that he must pay it to Mrs. Williams. But it is pressed upon the Court, that *Cresswell* stands in the place of *Ardesoif* and *Du Bourg*; but it is perfectly clear, whatever be the validity of *Ardesoif* and *Du Bourg*'s annuities, that no person can claim under an annuity granted to another, where there is not a good memorial; for it must appear, by the memorial, who has the present subsisting right; therefore this destroys the right of *Cresswell*, as representing *Ardesoif* and *Du Bourg*. If it stood over, and they were made parties, I could not decree *Ardesoif* and *Du Bourg* to make good conveyances, because under the act, there must be a memorial enrolled within twenty days, which being now past, it might be immediately pleaded in bar of the grant.

Affirm the decree.

(5) See the report 2 Ves. jun. 156. and the references in note (2) *ante*, p. 297. It is to be observed, that the above, and all other cases in these reports under the annuity act, must be considered as referable to the act of the 17 Geo. 3. c. 26. only. By the late act, 53 Geo. 3. c. 141., the provisions made by the former have been repealed, and other provisions substituted in lieu thereof. In all cases therefore subsequent to the above act of the 53d Geo. 3. reference must be to that act alone.

*Michael and Others against HARRIS and Others.*

(Reg. Lib. 1792. B. fol. 280.)

**THIS** bill was filed by the plaintiffs as partners in the *Cornish Copper Company*, in the business of smelting copper ore, [\*] against the defendants who are partners in the *Cornish Metal Company*, merely praying a discovery, and stating, that by articles of agreement bearing date the 1st of September, 1785, made between defendants on behalf of themselves and the rest of the *Cornish Metal Company*, of the first part; and several other persons therein named, and the plaintiffs as partners in the *Cornish Copper Company*, of the second part; it was agreed that the defendants should, from time to time, during the term of seven years, deliver to the said smelting company, a certain share of all the copper ore, which should be procured or purchased by the defendants in the county of Cornwall, in the proportions therein mentioned, and that the plaintiffs should smelt the same, and dispose thereof as therein mentioned, and that the defendants should pay for such ore, at the usual price, the customary allowance being first made as therein particularised; and the residue to be paid for by the said company, in the manner therein mentioned, and it was agreed, that the profit to be allowed to the said smelting company for carrying on the same, should be at the rate of 8 per cent. upon the standard price of copper, and that all the copper belonging to the defendants should, during the said term, be manufactured by the said company in which the plaintiffs were partners; and that the said smelting company should receive after the rate of 11l. per ton for manufacturing and smelting such copper, and that no copper should, at any time, be delivered or disposed of by defendants, for the purpose of being manufactured, by any person whomsoever, other than the said smelting company, and that all manufactured copper sold by the *Metal Company*, should be manufactured by the said smelting company, and that the quantities of every sort of copper, and every sort of manufacture, and species of casting, sold by defendants, should be made as nearly as possible in proportion to the ores, so to be delivered to them respectively, and the several parties were thereby bound in the penalty of 2000l. for the due observation of the several covenants therein contained.

The bill further stated, that in the month of November, 1787, the defendants having entered into partnership, or some contract with *Thomas Williams Esq.*, who was then concerned in smelting, and manufacturing copper ore, and copper, discontinued delivering to plaintiffs any copper, and have ever since delivered [\*] to his account large quantities of copper ore, purchased by the defendants, and of copper made from the said ore to a very considerable amount, to the great detriment of the plaintiffs, and in direct violation of the aforesaid agreement.

The bill particularly charged, that the defendants ought to discover the several transactions between them and the said *Thomas Williams*,

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[*See S. P.*  
2 Vol. Jan. 123.]  
1st May 1791.  
[*Easter term.*]  
Plea, to a bill  
for a discovery  
of frauds in  
breach of  
articles, that  
there was a  
clause in the  
articles, that all  
matters in difference should  
be referred to  
arbitration,  
over-ruled. (1)  
[\*312]

[\*313]

† This case is by accident misplaced: it appears by the date that it was in the last term.  
(1) *Vide S. P. Street v. Rigby*, before Lord Eldon C., 6 Ves. 815. *et seq.* See Lord Eldon C. 14 Ves. 270., Beames's El. Pl. Eq. 231, 232., and the authorities in the note there. See also the Editor's note on *Halfhide v. Fenning*, *antea*, 2 vol. 356. and *Anth v. Sambourne*, *postea*, 498., S. P., also with the principal case, *Montague v. Naish*, in the Exch. 1st May, 1725., Lord Colchester's MSS., which was also a plea to a suit between partners. Lord Ch. Baron Eyre, and Barons Hotham and Thomson there approved of Lord Thurlow's decision in *Price v. Williams*, stated by Lord Eldon C. 6 Ves. 818, 819., and of the principal case, which had been cited.

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respecting the delivering and manufacturing the said *copper ore and copper*, and the quantity of copper ore so by them had and purchased, during the time aforesaid, and smelted and manufactured at other works and mills, than those of the plaintiffs, and which have been sold by them, and the amount and value of the profits, which would have arisen to the plaintiffs, in case they had been permitted to smelt and manufacture their shares of the same, according to the said articles of agreement, and that the defendants have several *books, papers, accounts, writings, or letters* in their custody, respecting the said matters, and tending to shew that some such agreement had existed between them and the said *Thomas Williams*, for the purposes aforesaid, and that it would from thence appear that the defendants have sold very large quantities of copper, and manufactured copper produced from ores arising within the county of *Cornwall*, and have procured the same to be smelted and manufactured at *other mills*, than those belonging to plaintiffs, to their great loss, and that without *such a discovery they are totally unable* to proceed at law against the defendants, to recover a compensation for such breaches of the agreement, being unable to adduce legal evidence in respect of the said matters, without a full discovery thereof.

[ \*314 ]

The defendants filed their *plea* to the said bill, stating, that by the *articles of agreement* in the bill mentioned, it is, (amongst other things) agreed, and declared by and between the parties thereto, that in case any variance or dispute should at any time thereafter arise between them, or any of them, touching the construction of any of the clauses or articles therein contained, or any of their dealings, or transactions under the said articles, or in consequence thereof, or any other cause or thing whatsoever touching or concerning the same, or otherwise relating thereto, the same should be referred to the award, or determination of two indifferent persons, to be appointed for that [\*] purpose, one by or on the behalf of defendants, and the other by or on the behalf of the smelting companies therein named, (one of which said companies consists of the plaintiffs) or such of them as shall be more immediately concerned in any such variance or dispute, and that the award or determination to be made by such two persons touching the matters to be referred to them, should be binding and conclusive upon the said parties, so as such *award* should be made in writing under their hands and seals, and ready to be delivered to the said parties, or such of them as should require the same, upon or before the end of sixty days next after the said matters in difference should be referred to them, and that in case the said two persons so to be nominated, should not come to any determination in or touching the premises, within the time aforesaid, the said matters in difference should be referred to the award, or determination of such two persons, and also of such other person as they should think proper to nominate or associate with them in that behalf, and that the award or determination to be made by such three persons or any two of them in or touching the premises should be *binding and conclusive* on the said parties, so as such last mentioned award should be made, in manner therein mentioned; and defendants *averred* that all the several matters respecting which the plaintiffs sought a discovery, by their said bill were touching the construction of clauses in the said articles of agreement, or dealings and transactions of plaintiffs or defendants under the said articles, or in consequence thereof, and therefore defendants pleaded the aforesaid clause in the said articles of agreement, in bar to the discovery sought by plaintiff's said bill, &c.

Mr. *Attorney General*, Mr. *Mansfield*, and Mr. *Steele* for the defendants, insisted that the plea must prevail; that the plaintiffs had not by their bill sufficiently and clearly stated the absolute necessity of a discovery

covery of the several matters so as to proceed to a reference before the arbitrators; that the averment of the said clause was sufficient to support the plea; that the matters in dispute might be determined by the award of arbitrators, without resorting to law; and therefore the plaintiff was not entitled to the aid of a court of equity, for the purpose of a discovery, to enable him to proceed in an action, and relied upon *Halfhide v. Fenning*, (*ante* vol. ii. p. 336.)

[\*] Mr. Solicitor General, Mr. Lloyd and Mr. King, for the plaintiff, — contended that the plea was bad in *form* and *substance*. The plea merely alleges, that the parties are bound by contract to settle matters in dispute by arbitration: it should have alleged a submission to go to arbitration, and that there was no reference depending; the averment is nothing more than the mere clause: *Halfhide v. Fenning* is a very different case, if it is to be relied upon; (for the authority of that case is much doubted); there the bill was for relief as well as discovery, and there was an *averment*, that the matters in dispute were actually referred to arbitration. As to the *substance*, the plea does not meet the case made by the bill, which is founded upon certain frauds committed by the defendants, and which are out of the reach of the articles. It would be impossible for arbitrators to do justice, for the bill seeks a discovery of papers and writings in the possession of the defendants, which, without the aid of this Court, they could not be compelled to disclose, so that justice would be completely evaded, if the plea was allowed. *Wellington v. Mackintosh*, 2 Atk. 569. is precisely in point. Lord Hardwicke held it to be *no plea* to the *discovery sought* by the bill, and it appears from the statement of it in the Register's Book, that he decided it upon that ground. Such a plea would not avail at law, unless there had been an actual reference, as held in *Kill v. Hollister*, 1 Wils. 129.

Lord Chancellor. — In the cases at law, scarce a single dictum or even an hint occurs, where an agreement of this nature has been set up as a bar to the action (2): on the other hand, many authorities may be found, where the award itself, or the *submission to award*, has been pleaded; the court upon such a plea has gone into the award itself. The bill does not state that the parties are unable to proceed before the arbitrators, and that they cannot have the effect of this covenant in the articles respecting the reference, for want of a discovery; but taking no notice of that clause, it states a variety of circumstances, in which the defendants have violated the articles of agreement, and committed fraudulent acts and concealments on their part, to the detriment of the plaintiffs, and calls for a discovery, not for the purpose of going before the arbitrators, but in aid of an action at law. It has been objected, that the parties having entered into a covenant to refer matters in dispute to arbitration, this Court is not to aid such [\*] an action, and that it would be a plea to the action at law, if the parties were to proceed in it; and consequently there would be an end to a discovery, as it would be nugatory for this Court to lend its aid to an action, which must be completely barred by such a plea. I cannot think so. In the case before Lord Hardwicke, *relief* as well as *discovery* was *prayed*: it was a singular case, and whatever reason the Reporter has inserted as his Lordship's ground of decision, the plea was over-ruled, and quite agrees with the case in *Wilson*. Had the parties proceeded to a reference, or the award been actually made, it might still have been examined into or impeached in this court, upon equitable grounds. This is a case where no such reference has been had, and where the bill merely seeks a *discovery*, in order to aid the parties in proceeding at law, and the plea is in truth a plea to the action; and unless it could hold as a bar to the

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(2) *Vide* also per Lord Eldon C., 6 Ves. 822., and *Thompson v. Charnock*, 8 Term Rep. 139., and the Editor's note to *Halfhide v. Fenning*, *ante*, 2 vol. 336.

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Hanna.*

action itself, it cannot prevail here. With respect to the case of *Halfhide v. Fenning*, it is unnecessary to discuss that case; and it is upon the ground just mentioned, that I think, this plea must be

Over-ruled. †

† A plea of this nature was over-ruled, in the Exchequer, in *Satterley v. Robinson*, 17th December, 1791. (3)

(3) See note (1) *ante*, p. 311.

8th June.

CREUZE against LOWTH.

[*Vide S. C.*  
2 Ves. jun. 157.]

MICHEL against HUNTER.

Interest not to be given on the principal and interest, reported due on annuities, by the Master. Nor on arrears of an annuity in lieu of dower. (1) Though this application might be proper on further directions it cannot be on petition. (2)

[\*317]

THE petition (reported *ante*, p. 157.) came on to be reheard before Lord Chancellor, June 1st, when he expressed great doubt as to the propriety of the order of the Lords Commissioners, both in form and substance, and the discussion of it was ordered to stand over till this day.

And coming on now, Mr. Attorney and Solicitor General for the annuitants, and Mr. Selwyn and Mr. Adam for Mrs. Hunter, insisted that the order for computing interest was right, and that interest ought to be paid from the date of the Master's report; that the rule of the Court is, that when a sum is ascertained and ordered to be paid, it shall carry interest: that in the case of mortgagees, they, having a lien on the land, did not need the assistance of the Court, but their being paid interest on the [\*] interest computed by the Master, after the report, depended on the charge upon the land being ripened into a judgment of a court of equity. So of legacies charged upon land, they shall carry interest; but legacies not charged on land or simple contract debts shall not carry interest till the sum is ascertained by the report. They cited *Car v. the Countess of Burlington*, 1 Wms. 228. *Maxwell v. Wettenhall*, 2 Wms. 26. *Earl of Bath v. Earl of Bradford*, 2 Ves. 587. *Barwell v. Parker*, 2 Ves. 363. *Astley v. Powis*, 1 Ves. 483. 495., but relied principally on *Bickham v. Cross*, 2 Vesey, 471., which they contended was the very case now before the Court. (3)

In this case it is more than a judgment; it is a specific lien on the land.

With respect to the widow, she has made out the case, put in the anonymous case in 2 Ves. 661. (the name of which is *Signal v. Brereton*,) as she has been under the necessity of borrowing money, for which she has been obliged to pay interest, and therefore is entitled to receive it.

(1) See the Editor's notes on this case upon the former hearing, *ante*, 157, 158, &c. and more especially the references to the Editor's note on *Bickham v. Cross*, Supplement to Vesey, 388. *Anderson v. Dwyer*, 1 Scho. and Lefroy, 301. 304., *Turner v. Turner*, 1 Jac. and Walker, Rep. 39. *et seq.*, with the Editor's note on *Tew v. Earl of Winterton*, *ante*, 3 vol. 489, 490.

(2) See accordingly *per Lord Eldon C.*, 13 Ves. 393, 394.. *Et vide Champ v. Mosby*, 2 Ves. 470., where the general rule is laid down, (subject to particular exceptions) that to warrant a reservation of interest of any kind upon further directions, it ought to have been directed on the original decree.

(3) See the Editor's notes upon *Bickham v. Cross*, Supplement to Ves. 388, 589, *ante*, 159., and Lord Loughborough's observations in the principal case upon it, 2 Ves. jun. 160. 164. 166.

In *Margerum v. Sandiford*, interest was given on further directions, though not reserved by the decree. †

Mr. Mansfield and Mr. Stanley for the tenant in tail of the estate.

There is no ground upon which the present application can be supported. Mr. Attorney General and Mr. Selwyn say that the Lords Commissioners made the order upon the ground of *Margerum v. Sandiford*. There *Margerum* and *Pugh* were executors, and had made great use of the testator's money; Lord Thurlow over-ruled the old form, and gave interest on further directions, without having the cause re-heard, though no consideration of interest was reserved by the decree; but how does that shew that the Court ought to do it on petition, without any further directions reserved? The only case pretended in which it was done on petition, is *Bickham v. Cross*, which was under very particular circumstances (4). — Then, as to the merits, it is generally contended, that this is the course of the court. The Earl of [\*] *Bath v. Bradford*, *Barwell v. Parker*, are cited, but do not prove this. *Perkins v. Baynton*, (*ante*, vol. i. p. 574.) is the other way. *Astley v. Powis* is not very accurately stated, but it appears a great deal of time had elapsed. In all the cases, it has been done on special circumstances. There has been no general practice on the subject.

With respect to the widow's jointure *Tew v. Earl of Winterton*, (*ante*, vol. iii. p. 489.) is a strong authority, by Lord Thurlow, against it.

Lord Chancellor spoke to the following effect.

I thought, upon the former hearing, that this application was wrong both in form and substance; that no such order could be made on petition: for if interest was not given by the decree, or reserved, it was matter of re-hearing; and this, in strictness, is the rule; but if the point is made upon a hearing for further directions, I see no objection to its being then given, if the case will warrant it; I am satisfied with the authority of *Margerum v. Sandiford*, that it may be so; but to introduce it upon a petition would be inconvenient in practice.

The general point must be considered, and *Bickham v. Cross* having been cited, that case must be taken into consideration: and it seems hard, that when the order is that the sum should be raised and paid, it should not be done immediately; if it is considered as the rule of the court, to give interest upon interest, on sums reported due, of course, the persons entitled to the benefit of it would be more interested in delay, than the owners of the estate; and the interest running on, the estate would be exhausted. Every person interested may prosecute the decree.

It has been argued, that when the sum due is ascertained by the Master's report, it is equal to a judgment, and is become a charge upon the land. I am not unwilling to admit that a debt consisting of principal and interest, computed on a Master's report afterwards confirmed, should have the effect of a judgment at law; but I cannot admit a consequence, that would carry it further than a judgment at law; for there interest subsequent [\*] to the judgment cannot be recovered; a plaintiff cannot recover the interest between the date of the judgment and the issuing of an elegit; so that the argument would give an effect to a Master's Report, that a judgment has not. I have always understood that debts carrying interest in their own nature, have interest calculated upon them in the Master's office, but that debts not carrying interest have not; and that the invariable practice in calculating subsequent interest is to calculate it upon the debts upon which it had been calcu-

† The same had been done in *Goodere v. Lutz*, Amb. 584.

(4) See note (3) preceding page.  
Q 3

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[\*320]

lated before the report, and only to state the principal of the other debts; and if I was now to hold, that the subsequent interest ought to be calculated on all, it would make all the former cases erroneous. In *Bickham v. Cross*†, [2 Ves. 471.] I see by the note I have of the [\*] case, that

† *Bickham v. Cross*. — There being no state of this case in *Vesey*, the following is taken from the Register's book. (5)

Previous to the marriage of the petitioner, defendant *Cross*, daughter of *Bickham* the father, with *Asterley* her first husband, in 1712, it was agreed that *Bickham* the father should give a bond for 900*l.* payable in seven years, and the interest in the mean time to be paid to the defendant, for her separate use, till laid out in a purchase of lands, and when laid out, the profits to be paid to the plaintiff for her life, and that *Asterley* should give a bond for the same sum, to be laid out, and the profits to be paid to him for life, remainder to the petitioner, and the land to be purchased with both sums, to be settled to the use of the issue of the marriage; the bonds were given, the marriage had, and soon after *Asterley* died insolvent. Neither *Bickham* the father nor *Asterley*, laid out the sum of 900*l.* in purchases; and, on the petitioner's second marriage with *Cross* in 1715, *Bickham* the father's bond for 900*l.* was assigned to trustees, in trust for the petitioner, till he made a suitable settlement. *Bickham* the father paid the petitioner the interest of the bond, till near the time of his death in *October*, 1723, having made his will, and thereby given to his youngest son *John* 800*l.* to be paid at twenty-four years of age, to be raised out of his real estate by a term which was vested in his wife, *Hugh* his eldest son, and another trustee, and devised his estate to his wife for life, with remainder to *Hugh* in tail, and appointed his wife and son executors, who proved the will. *Hugh* when of age suffered a recovery of the estate. The widow out of the assets of her husband and the rents of the estates, paid the interest of the 900*l.* bond for several years; and paid *John* the sum of 300*l.* in part of his legacy, and joined with *Hugh* and the other trustees, in a bond and mortgage of the terms for 500*l.* the remainder of his legacy; and she paid to him interest for the same to the 9th of *September*, 1735, the said *Hugh Bickham* refusing to pay the same. *Rachael*, the widow died in 1736 having made her will, and thereby given to the petitioner all her personal estate, and made her sole executrix. The petitioner and her husband having brought an action on the bond against *Hugh Bickham*, he filed his bill for an injunction and an account of his father's personal estate come to the hands of his mother: and the petitioner and her late husband filed a cross bill. By decree in those causes in 1743 it was referred to the Master to take the proper accounts, and it was declared that the bond for 900*l.* was to be considered as a debt on the estate of *Bickham* the father, to be satisfied out of his personal estate, and it was ordered that what should be coming due for interest on said bond should be paid to the petitioner, for her separate use, and the principal to the trustees, and that the mortgage and bond for 500*l.* ought to be considered as a charge on the term of 50 years, and the interest thereof to be paid by *Bickham* the son, to the petitioner, (whose title to the same is not stated,) and her late husband. Afterwards *Bickham* the son died, leaving *Jane* his widow, *Hugh* his eldest son, and younger children, and devised his estate to trustees, charged with his debts, and an annuity to his wife, and legacies to his younger children and made his wife executrix. A bill was filed to establish his will, and by a decree in 1747, (subject to other directions,) *Bickham* the son's estate was ordered to be sold, and the money applied in payment of debts. Afterwards the petitioner's husband died. And the cause being revived, a report was made that there were no debts of *Bickham* the father, but the said bond for 900*l.* and another of 11*l.* 11*s.* 10*d.* and that the whole principal money of 900*l.* was due on the bond, and 954*l.* odd was due for interest at 5 per cent. which interest was to be paid to the petitioner, and the principal to the trustees to be applied to the trusts, and that *Rachael Bickham* the widow had paid 194*l.* and odd for interest of the 500*l.* bond and mortgage, which was to be paid by the then plaintiff *Hugh Bickham*, to the petitioner and her late husband, as part of the assets of *Rachael Bickham*, and that *Hugh Bickham* died without paying the same. On the cause coming on upon the Master's report, in 1751, accounts were directed of subsequent interest, and there was a further report by which it appeared there was then due, for principal and interest of the 900*l.* bond and the bond of 500*l.* 2306*l.* 9*s.* 6*d.* which was to be raised, and paid to the petitioner, out of the said trust estate, and this report was absolutely confirmed.

The petitioner stating these facts and delays, prayed that the said sums might be consolidated and carry interest from the date of the report.

And the petition being heard 29th of *July*, 1752, it was ordered that it should be

(5) See it also accurately stated from *Reg. Lfb.* 1751. A. fol. 561., in Supplement to *Ves.* 388.

referred

that Lord *Hardwicke* was perfectly right in his decree, because, in consequence of *Bickham* the son having wasted the estates of the father, all the debts of *Bickham*, the father, were charges on the estate of *Bickham* the son. The argument to be drawn from that case, is against the position for which it is cited. The case of arrears of annuities, does not differ from the common case of a debt not carrying interest.

The first case with which I have been supplied, is *Lloyd v. Moreland*, by Sir *John Strange* sitting for the Lord Chancellor; the cause was referred to the Master to take an account of the testator's debts: the Master made his report, and upon the cause coming on for further directions, it was referred back to the Master to calculate subsequent interest: he calculated the subsequent interest on the same debts on which he had before calculated interest: he was desired to calculate interest on the simple contract debts, but refused; and exceptions were taken on that ground to his report: the exceptions were argued 19th March, 1749, and were over-ruled.

[\*] Duke of *Bedford v. Coke* (7) before Lord *Hardwicke*, was a strong case to extend the remedy, because there had been a long delay: the plaintiffs were simple contract creditors of the Duke of *Wharton*: the decree was upon the 29th October, 1743: the Duchess applied for interest on the arrears of her jointure, which had been unpaid for a great number of years, and made the case of having been obliged to borrow money, Lord *Hardwicke*, by his decree, reserved the question of interest, and ordered precedents to be searched; but no precedents could be found where it had been allowed.

In the anonymous case, 2 Vesey, 661. (the name of which is *Signal v. Brereton*), the question came distinctly before Lord *Hardwicke*, who, at first reserved the consideration of interest, but afterwards refused to give interest on the arrears of the annuity, though he gave it on the debts from the time of the report being confirmed.

In *Grosvenor v. Cook* (8), before Sir *Thomas Clarke*, 25th November, 1757, the same point arose: the question was reserved to see how far interest was allowed at law on simple contract debts.

In the *Society for propagating the Gospel in foreign Parts v. Jackson*, which was heard before Sir *Thomas Sewell*, it was referred to the Master to calculate interest: February 11th, 1783, the Master made his report, and certified 349*l.* due for the arrears of an annuity: the fund was productive, but the cause coming on before Lord *Thurlow*, 11th March, 1783, he directed the Master to calculate the amount on the debts, without interest, they being simple contract debts, and the arrears of the annuity. *Lloyd v. Moreland* was the case produced to Lord *Thurlow* on that occasion.

Nobody has produced a case which will support the order of the Lords Commissioners.

I could not make such an order without breaking in upon the practice of the Court.

I have selected these cases as being those where it was pressed upon the Court.—

The order of the Lords Commissioners discharged.

referred to the Master, to compute subsequent interest in manner following, on the principal sum, that carrying interest, at 5 per cent. and on the other sums and [also on all the interests and (6)] costs at 4 per cent. and to tax subsequent costs.

(6) See the order, extracted from the Reg. Book, *verbatim* in Supplement to Vesey, 388, 389., where it is observed there is an omission of the above very material words in the Report of Mr. Vesey jun. pp. 164. 166.

(7) See this case well reported by Mr. Dickinson, 1 vol. 178. *Et Vide* Supplement to Vesey, 293.

(8) 1 Dick. 305.

1793.

CREVE  
against  
LOWTH.

[\*321]



1793.

[ \*322 ]

[Vide S. C.  
2 Ves. jun. 187.  
and a further  
stage of the  
cause, *ibid.* 454.]

12th June.

Plea that de-  
fendant's tes-  
tatrix had  
neither con-  
structive or  
actual notice of  
plaintiff's title,  
not denying the  
facts stated in  
the bill from  
which the con-  
structive notice  
is to be de-  
ducted, over-  
ruled. (1)

[\*] JERRARD *against* SANDERS.

(No Entry.)

THE bill stated that *John Harrington* being seised of estates, comprising the leasehold premises in question, by lease dated some time in or before the month of *September*, 1711, demised the same to *John Gold*, for a term of 1000 years, and by virtue of several meane assignments, the premises in 1730 were vested in *John Harris* for the said term, subject to a mortgage to *Edward Bellamy*, for securing 250*l.* and interest; and in or about the said year 1730, *Christopher Jerrard*, (the plaintiff's grandfather) purchased the said premises, for the residue of the said term of 1000 years, absolutely, from the said *John Harris*, for the sum of 220*l.* and by an indenture dated some time in or about said year 1730, (stated to be in possession of defendant) reciting the agreement for the purchase, and that there was due to the said *Edward Bellamy* 250*l.*, the said *Edward Bellamy*, in consideration of said 250*l.* to him paid, assigned, and the said *Harris* ratified and confirmed unto trustees appointed by *Christopher Jerrard*, the said premises during the residue of said term of 1000 years, in trust to permit the said *Christopher Jerrard*, (now deceased), and his assigns, to receive the rents and profits thereof for his life, and, after his decease, to permit *Thomas Jerrard*, the son of *Christopher Jerrard*, and *Susannah* his wife, both deceased, (the plaintiff's late father and mother,) respectively, and their assigns, to take the rents and profits of the said premises during their lives, and the life of the survivor of them, remainder in trust, *for all and every the child and children of the said Thomas Jerrard by the said Susannah, who should be living at the death of the survivor*, for the remainder of the said term, with subsequent limitations. *Christopher Jerrard* (plaintiff's late grandfather) held said premises from the time of the purchase till his death, in 1739, when said *Thomas Jerrard* (the plaintiff's father) entered upon and held the same premises down to the time of his death, which happened about fifteen years ago: that *Susannah*, the wife of the said *Thomas Jerrard*, died in the life-time of plaintiff's father, and plaintiff is their only surviving child, and, as such, became entitled to the said premises under said deed and settlement. Upon the death of the said *Thomas Jerrard*, her late father, she entered upon and hath ever since been in [\*] the possession of the premises, under and in virtue of said deed and settlement, and the trusts thereof.

[ \*323 ]

The bill further stated, that, under colour of some pretended mortgage of said premises from said *Thomas Jerrard*, plaintiff's late father, (who had no right or power to make the same,) the said defendant, or some person with his privity, had got into his custody and possession the said deed and settlement under which plaintiff had become entitled to said premises as aforesaid, and the title-deeds thereof.

The bill charged the defendant with knowledge of the deed whereby the said premises were settled, so that plaintiff had become entitled thereto, and that the defendant had the said deed and settlement under which she was so entitled, or some copy, counterpart, or duplicate thereof, or some abstract, extract, recital, minute or memorandum thereof or therefrom, in his custody or power; and that he had seen, read, or heard the contents, and knew and believed that said deed and settlement under which she was entitled as aforesaid existed, where, and in whose

1) See Mr. Eames's Elem. Pleas in Eq. p. 259. and note 3. Vide etiam, *ibid.* p. 21.

custody

custody and power, the same then was and might be found, and that he ought to state the contents thereof; and in case the same had been burnt, torn, defaced, obliterated, cancelled, destroyed, disposed of, or made away with, that the same was so done, or caused to be done by, or by the orders, on the behalf, or with the privity of defendant, with some fraudulent purpose to her prejudice.

The bill further charged the defendant with *knowledge that said Thomas Jerrard*, plaintiff's late father, was, at the time of making said mortgage, entitled to the said premises, under the said deed and settlement, as tenant for life only, with such remainder over as hereinbefore stated to the plaintiff; and that he had not any other interest therein, and had no right or power whatever to make such mortgage deeds and securities, as an abstract of said *Thomas Jerrard*, plaintiff's late father's title to said premises so settled, containing some recital, notice, or mention thereof, and of the trusts contained therein, and of the right and interest of said *Thomas Jerrard*, and of plaintiff under the same, or some assertion or suggestion tending to an enquiry and discovery thereof, and of plaintiff's right and claim, was sent and delivered unto defendant, and the several mortgagees and incumbrancers [\*] under whom he derived title to the said premises, or some attorney, solicitor, or agent, of and for him or them; and that they were informed and had notice of the said deed and settlement, under which the plaintiff was entitled as aforesaid.

The bill therefore prayed, that the defendant be decreed to deliver unto plaintiff the deed and settlement under which she had become and was entitled to the premises in question, together with all title deeds and writings relating thereto; and that the plaintiff might have a production of the said deed, &c. at any trial at law against plaintiff or her tenant of said premises.

The defendant put in a plea and answer, and thereby stated that *Thomas Jerrard*, being possessed of a long term of years in the premises, subject to a mortgage to *Catherine Cam* for a term of five hundred years, for securing 500*l.*, the said mortgage was, by indenture of 25th June, 1763, transferred to *Alice Dickes*, who, by will dated 7th November, 1774, after legacies, gave the residue, and (among other things) the legal estate in all messuages, &c. in mortgage, to four trustees in trust to pay legacies, and subject thereto, on trust for the sole benefit of her grandson (the defendant), in case he should attain the age of twenty-one years (which event took place); and that, after the defendant attained such age, the premises were conveyed to him, subject to the equity of redemption to which the same were liable. He further stated, that *Thomas Jerrard* died about the year 1777, having made his will, reciting the mortgage, and that the mortgaged premises were an ample security for payment thereof, and directed that the mortgage-money should remain a lien thereon only, and not on his personal estate, and gave all the residue of his real and personal estate unto his wife *Jane Jerrard*, and appointed her sole executrix; and that, after his death, she proved the will. He further stated, that the mortgage-money, with a great arrear of interest, but in respect of which some payments had been made by the plaintiff, remained due, and that the premises mortgaged to *Alice Dickes*, and those alleged by plaintiffs to be comprised in the settlement, are the same premises, and that *Thomas Jerrard*, who mortgaged the same to *Alice Dickes*, was in possession thereof, and, if not in fact, pretended to be absolutely entitled thereto, subject to said mortgage to *Catherine Cam*, at the time the assignment of the mortgage was executed. And the defendant [\*] averred that *Alice Dickes* actually paid the said 500*l.* without notice, either constructive or actual, of the existence of the title set up by the plaintiff; and therefore,

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SANDERS.

[\*324]

[\*325]

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fore, and because the plaintiff does not offer, by her bill, to confirm the said mortgage, and this *Court doth not compel a discovery which might hazard the title of a mortgagee bond fide, and without notice, or those claiming under him*, the defendant pleaded the said mortgage; and not waving his plea, but, in aid and support thereof, he said that the said *Alice Dickes* (under whom he claimed) had not, to his knowledge, information, or belief, any notice, *either constructive or actual*, of the existence of the title set up by plaintiff in her said bill, at the time she paid the said sum of 500*l.* and the assignment of the said mortgage was executed: nor doth defendant know, believe, or suspect, nor hath he ever been informed, that, *at or before the making the said assignment*, affecting the said premises under which the defendant claims, or *before or at the time of payment of the consideration* or value for the same, or any part thereof, that the said *Alice Dickes*, or any attorney, solicitor, or agent of the said *Alice Dickes* in that transaction, had any particular abstract of the said *Thomas Jerrard's* title to the premises delivered to her, him, or them, which included the settlement set up by the plaintiff, or any recital, notice, or memorandum thereof, or of the alleged trusts thereof; or any suggestion tending to an enquiry or discovery thereof; or of the plaintiff's right or claim, as set up by the bill.

Upon this plea being argued,

Lord Chancellor said, a denial of *actual or constructive notice* is not sufficient, without denying those facts stated in the bill, from whence the constructive notice is to be deduced.

Plea over-ruled. (2)

(2) The defendant afterwards put in an answer, whereby he stated that he was a purchaser for valuable consideration, and denied all the circumstances of notice: upon which it was held, that he was not bound to answer further in disclosure of his own title, or other matters, which to such a defence must be immaterial. See the Report of those subsequent proceedings, 2 Ves. jun. 454., &c.

[\*326]

[\*] SQUIRE against DEAN.

18th June.

(Reg. Lib. 1792. B. fol. 654.)

Baron and  
feme.

Where husband  
receives interest  
of wife's se-  
parate property,  
no account  
against his representatives. (1)

THE husband received dividends of the wife's separate property, being money in the funds, and applied them to the general purposes of the family: the wife survived the husband.

Lord Chancellor refused to give her representatives an account of the dividends against the representative of the husband. (2)

(1) See the cases, 1 Fonbl. T. Eq. 103, 104, note.

(2) The account was confined to what the husband had received of the wife's separate property at the time of their intermarriage. R. L. 655.

POPE *against* CRA[W]SHAW.

1793.

(Reg. Lib. 1792. B. fol. 368. b.)

Rolls, 20th  
June.

**H**IS Honor said he hoped it would be understood that a husband cannot, by assigning his wife's property, bar her of any equity she may have in it: that he should never subscribe to the contrary doctrine. (2)

Baron and  
feme.  
Husband's  
assignment of  
the wife's pro-  
perty will not  
bar her equity  
upon it. (1)

See *Wenman v. Mason*, Mr. Cox's note on 1 Wms. 459. (5th edit.)

(1) See *Pryor v. Hill*, *antea*, 139., with the Editor's notes; and more especially the reference to Mr. Roper's recent very valuable Tract on Marital Law, 1 vol. 266. *et seq.*

(2) In this case the wife appeared personally in court and consented. R. L.

ZOUCH [LEACH (1)] *against* LAMBERT.

(Reg. Lib. 1792. B. fol. 690.)

[*Vide* S. C.  
4 Ves. 725.]  
Rolls, 22d June.

**T**HE husband gave the wife an estate for life, and appointed her executrix, but made no disposition of the residue.

His Honor decreed the residue to be divided among the next of kin. (1)

Feme executrix  
having a life  
estate, not to  
take the  
residue. (1);

(1) The M. R. most probably threw out his general sentiments, *upon this occasion*, *ut supra*, but Mr. Brown mistook both the name of the case, and the nature of its result at the time. The cause appears not to have been decided until upwards of seven years afterwards; when Sir P. Arden, M. R., noticing Mr. Brown's mistake, said he had left the point open, and only directed the usual accounts, &c., at the hearing, and that it was by no means so clear for the next of kin as thus considered [under the particular will in question.] His Honor, however, said "he was, upon full consideration, of the same opinion which it is supposed he gave upon the former occasion; that, under the circumstances of this case, the bequest to the widow was a bar of her interest as executrix in the residue." See the cause 4 Ves. 725., *Et vide ibid.* 726., note, and 729. Upon the point of law, see *Martin v. Rebow*, *antea*, 1 vol. 154., and the Editor's notes *ibid.* with the references.

MERCER and Wife *against* HALL and Others.

(No Entry.)

Rolls, 24th  
June.

**M**ARY BATTEN, possessed of a large sum of money in 3 per cent. Bank annuities, made and published her will, dated [\*] 30th March, 1779, and thereby, *inter alia*, gave and bequeathed to the defendant Legacy to plaintiff in case of marriage with consent (1) of parents; they consent, by a writing, generally to any marriage she may contract: after the decease of the survivor, plaintiff marries; consent was only necessary during the life-time of the father and mother or the survivor — if otherwise, this general consent is sufficient.

[\*327]

(1) See *D'Aguiar v. Drinkwater*, 2 Ves. and Beam. 225.; *Merry v. Ryves*, 1 Eden. Ca. Lord Northington, 1.; *Parnell v. Lyon*, 1 Ves. and Beam. 479.; the important case of *Clarke v. Parker*, 19 Ves. 1. *et seq.* which includes most of the preceding; *Lloyd v. Branton*, 3 Meriv. 108, &c., and *Aislabe v. Rice*, 3 Madd. Rep. 256, &c. See also *Scott v. Tyler*, *antea*, 2 vol. 431., and *Goldsmid v. Goldsmid*, Coop. Ca. Ch. 225.

Hall,

1793.

MERCER  
against  
HALL.

*Hall*, and others (since dead), their executors, &c. the sum of 1500*l.* 3 per cent. annuities, in trust for the use and benefit of the plaintiff *Mary*, to be paid and transferred to her upon her marriage, with the previous consent in writing of her mother, if living; but if then dead, with such consent of her father; and in case she should marry without such consent, during the life-time of her father and mother, or either of them, she willed that the same legacy should be settled to the separate use of herself and her children, in such manner, and in such proportions, &c. as the survivor should direct or appoint; and, for want of such direction or appointment, to be equally divided amongst them, &c.; and, in case the said plaintiff *Mary* should happen to die sole and unmarried, or if she should marry without such consent as aforesaid, without leaving any issue of her body at the time of her decease, then the said legacy was to sink into the residue of her personal estate, which she disposed of by her said will, and appointed her daughter *Mary Coulthard* (since deceased) executrix.

The testatrix died in the year 1781, without having revoked or altered her said will, and soon after her death the said *Mary Coulthard* duly proved the same; she died in 1782 leaving her husband the defendant *Coulthard*, who took out administration to her, and the defendant *Hall* has taken out administration *de bonis non* to the testatrix.

*Robert Slaughter*, the plaintiff *Mary's* father, died many years ago; her mother *Jane Slaughter*, who was the sister of the said testatrix died the 9th day of May, 1790, but they, before their deaths, consented to the plaintiff *Mary's* marriage, and for that purpose signed a paper writing, to the effect following, viz. "In pursuance of a clause, in the will of the late Mrs. *Mary Batten*, this is to certify, we do give free leave and consent to our daughter *Mary Slaughter*, to marry whomsoever she chooses, and whereas power is vested in us, to settle a legacy of 1500*l.* left her by said will in what manner we shall think proper, we do hereby give her full power, and sole command and possession thereof, to settle and dispose of, according to her own inclination, without being subject either to the limitations and conditions [\*] mentioned in said Mrs. *Batten's* will, or to the authority of her husband. In witness whereof we do subscribe our names the 5th July, 1787, *Robert Slaughter, Jane Slaughter.*"

[ \*528 ]

After the death of the plaintiff *Mary's* father and mother, viz. 16th day of September, 1790, the plaintiffs intermarried, and there were no children; the defendant *Hall* the trustee refusing to pay the legacy of 1500*l.* stock, and the dividends thereof without the directions of this court, the plaintiffs filed the present bill for the same.

The defendants submitted by their answer, whether the plaintiffs' marriage had been had with such consent, as by the testatrix's will was required.

Mr. *Richards*, for the plaintiffs, submitted that the father and mother being dead before the marriage, no consent could be had. Without relying on the paper, it might be argued that no consent was necessary, the condition of consent only operating during the lives of the father and mother: but if consent was necessary, the terms of the paper were sufficient for that purpose.

Mr. *Stanley*, for the defendants, argued that the consent was a condition precedent, and therefore was necessary at all events: then the parents being dead, the consent was become impossible. The paper is not such as could operate as an appointment under the power.

His Honor said he was clear that the plaintiffs were entitled to the legacy: that the consent was only necessary, during the life of the father and mother or the survivor; and could only be intended of a marriage during their lives: and although the testatrix intended there should

should be a consent to the particular marriage, the intention is sufficiently answered by this general consent.

A consent after the marriage has been held sufficient, where it was not required to be in writing.

All these sorts of restraints are considered in such a way as to favour legatees, where there is nobody to take on default of consent; if the material part of the condition is complied with, the legacy is held good.

[\*] She is entitled to the legacy exclusive of the writing; for under the power, the father and mother could not have appointed the whole to the daughter, but must have given something to the children, if there had been any.

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MARR  
against  
HALL.

[ \*329 ]

PINCKE *against* CURTEIS.

Rolls, 26th  
June.

(Reg. Lib. 1792. B. fol. 410. b.)

**B**ILL filed 6th November, 1792, for a specific performance of an agreement, to purchase the premises in question.

It stated that the plaintiffs being desirous to sell the premises, in August, 1791, applied to the co-plaintiffs *Skinner* and *Dyke* to sell the same by auction, that they did accordingly prepare particulars stating, that part of the premises were let upon leases, of which some part of the terms were unexpired, and that other parts were in hand, of which immediate possession might be had by the purchaser; and the particulars contained the usual terms of sale by auction, particularly that the purchase should be completed by the 5th of April then next: that the premises were put up to sale, at *Garraway's* coffee house, 11th Nov. 1791, when the defendant was the best bidder for the same, at the sum of 9,100*l.* and was declared to be the purchaser, and paid into the hands of the auctioners 910*l.* as a deposit, and signed the usual undertaking for completing the purchase, upon having a good title: that the plaintiffs had been always ready to make a title, upon payment of the residue of the purchase-money; but that the defendant had not only refused so to do, but in *Trinity* term last had brought an action against the plaintiffs the auctioneers, to recover his deposit. The bill, therefore, prayed a specific performance of the agreement, and an injunction against the defendant's proceeding in the said action.

The defendant, by his answer, admitted the purchase; but said that, towards the latter end of *January*, or beginning of *February*, he had applied to the plaintiff's solicitor for an abstract, which not being sent to him, he, after the expiration of the time for the completion of the said purchase, applied for a return of the deposit money, saying that he should not proceed in the [\*] purchase; and that a few days after the 21st of *April* last, and not before, the defendant received an abstract; by a memorandum in the margin whereof, and a letter from the plaintiff's solicitor, it appeared that a suit in this court must be determined,

chaser must take to the rents, and pay interest on his purchase-money till the principal is discharged. (2)]

[ \*330 ]

(1) See the doctrine of the courts of equity, upon this subject, well expounded by Lord Eldon C., in *Seton v. Slade*, 7 Ves. 265. 270. 272, 273. *et seq.* See also *Lloyd v. Collett*, and *Fordyce v. Ford*, *postea*, 469. 495. and *Newman v. Rogers*, *postea*, 391.

(2) From Lord Colchester's MSS. See within, and His Lordship's Report of the judgment of the M. R. upon the hearing of this cause on further directions, in the Editor's note, *postea*, p. 332.

before

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against  
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before a title could be made: upon which the defendant caused the plaintiff's solicitor, to be informed that he would not proceed in the purchase, and again insisted on the return of his deposit: and stating that the suit was still depending, and that questions of law have arisen, which then stood for argument in the Court of King's Bench, and that although the purchase was to be completed, by the 5th of April, no abstract was sent to him till after the twenty-first of that month, he insisted that the plaintiffs had not made a good title, and that he was not bound to perform the agreement.

It came on before the Lords Commissioners *Ashurst* and *Wilson* upon a motion to dissolve the injunction.

*Mr. Mansfield* and *Mr. Steele*, for the defendant, said the plaintiffs could not recover at law, in an action against the defendant, if the title was not completed by the time named in the contract. If it is not so, by the laches of the seller, this court will not enforce the contract. There may be such a difference in point of value, arising from the delay, as may be a good reason for not compelling performance of the contract. The attorney for the plaintiff ought to have delivered the abstract without any application from the defendants. When the abstract was delivered, it appeared by it, that there was a suit depending in this court, and that the plaintiffs could not make a title. The defendant was not bound to declare, that he would relinquish the contract, as the plaintiffs could not perform it on their part. In a case of *Potts v. Webb*, before Lord *Thurlow*, it being part of the terms that the purchase should be completed by a certain time, and the title not being made good within that time, his Lordship thought that a good reason for not decreeing a specific performance. Here the Court is not called upon to pronounce upon the title; we only want the deposit back; the plaintiff may, notwithstanding, have a specific performance hereafter.

[ \*331 ]

[\*] *Mr. Solicitor General (Scott)* for plaintiff.

The defendant makes two grounds, 1st. That there is not a good title, 2d. That supposing it to be good, the defendant is not bound, now, to take it. The deposit, is, in truth, the money of the seller, if the contract is decreed to be performed. The auctioneer cannot keep the money, though the action at law fails; and as one party must come into this court, it will take cognizance of the whole. In *Potts v. Webb*, *Christie* the auctioneer brought the deposit into court, which is the general practice.

Lord Commissioner *Wilson*.—The suit depending is the only thing that strikes me.

*Mr. Solicitor General*.—If there be a solemn doubt, I agree that the Court will not compel the purchaser to take it. With respect to the title, the question is whether a good title can be made at the date of the Master's Report, not at the date of the contract, or the time of filing the bill. Here the question will be decided before any report can be made. Sometimes (even in the report) the Master makes mention of acts to be done, to make good the title. The mere pendency of the suit is no objection; it may clear the title.—Here the defendant does not ask for a reference to the Master, and claim his deposit in the event of there not being a good title, but objects to a performance of the contract at any time. In *Vernon v. Stephens*, 2 P. Wms. 66., an act of parliament was procured between the decree and the report (3). In *Langford v. Pitt*, 2 Wms. 629., and in *Williams v. Bonham*, before

(3) Upon the question of *performance*, it is sufficient if a good title can be made at any time previous to the Master's final report on the subject. See Lord *Stourton's* case, cited 2 P. W. 630., *Jenkins v. Hiles*, 6 Ves. 646., *Wynn v. Morgan*, 7 Ves. 309. et seq. per Lord *Eldon* C., in *Seton v. Slade*, *ibid.* 279. and *Bennet Coll. v. Carey*, *ante*, 3 vol. 390., with the Editor's notes.

Lord

Lord *Thurlow*, the agreement was performed after a long time had elapsed.

Lord Commissioner *Ashhurst*.

If there is no damage done to the party, an agreement may be enforced after the time named. If there is a probable ground that a good title can be made in a reasonable time, that will do (4). Can the defendant in this case be put into the same situation as if the agreement had been performed at the time? The proposal was, that the money should be laid out at the risque of the vendor, so that the defendant would not have been hurt by accepting the offer.

[\*] Lord Commissioner *Wilson*.

The cases with respect to time have gone to a great length, but we cannot unsettle them now. It is not stated that any notice of any intention or design of relinquishing the purchase was given till after the 5th April, and the abstract being read by the defendant; something must have previously passed.

In *Ambrose v. Hodgson*, a suit was commenced to determine the question on objections made to the title in a suit for specific performance.

The injunction was continued on bringing the deposit into court.

The motion was brought on again before the present Lord Chancellor.

After the argument, which was to the same purpose as before, his Lordship expressed himself to the effect following:

The vendor could not bring an action against the vendee without having tendered him a conveyance.

In these contracts (sales by auction) in general, the time of completing the contract is specified, and a deposit is paid; and if the title is not made out by the time, the vendee is entitled to take back the deposit.

But, in this case, the vendee was apprised of the title depending on the ability of the vendors to make a good title, which itself depended on the event of a Chancery suit, and was, notwithstanding, willing to go on with his purchase; there had been a communication of the delay of the suit, and the present bill was filed after great delay. If the vendee had called for the deposit at the end of the time limited for completing the purchase, and insisted he would not go on with the purchase, the Court would not have compelled him.

I concur with the Lords Commissioners, that the injunction should be continued.

[\*] This day, the cause came on to be heard at the Rolls, when all the evidence was read, and his Honor being of opinion that there had been a sufficient communication of the real state of the delay, and that the defendant had acquiesced in it, or at least not sufficiently declared his dissent to go on with the purchase, referred it to the Master to enquire whether the plaintiff could make a good title (5).

(4) See note (3) preceding page.

(5) It is said (6 Ves. 676.) that in this case Lord *Loughborough*, ultimately relieved the purchaser from his contract, upon the ground of there appearing upon the face of the Master's Report, to have been a gross misrepresentation as to tithes. Previously, however, to this stage of the cause, it came on before Sir *P. Arden* M. R., in the *December* following the period of Mr. *Brown's* Report: and as His Honor's judgment is reported in Lord *Colchester's* MS. and seems very valuable, the Editor thinks it material to be subjoined. Lord *Colchester's* note of it is as follows:—

“ *PINCKE v. CURTIS, December 19th, 1795.*

“ This cause standing for judgment on further directions and costs. Master of the “ Purchaser is  
“ *Rolls*. I approve of the order made by the Lords Commissioners in staying the sc- “ entitled to  
“ tion, “ interest on  
“ his deposit and to costs at law and in equity, until the vendor has made his title good. But vendor is  
“ entitled to subsequent costs, and may enforce the contract if his title be good when the report is made.  
“ The rents belong to the vendor till his title be made good, and afterwards the purchaser must take to the  
“ rents, and pay interest on his purchase-money till the principal is discharged.”

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[ \*332 ]

[ \*333 ]



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against  
**CUTBUSH.**

"tion, and as the cause stands at present *Pincke* the vendor has ultimately shewn that he can make a good title. But the contract is only too barefaced upon fair terms; viz. if the vendor has filed a bill to compel the acceptance of a title which was not ready at the time, then the vendor shall pay costs of the suit at law, which was well founded at the time it was commenced. Therefore down to the day of the purchaser is not liable to costs.

"The fair terms it is said would be to put the parties in the same situation as if the contract had been performed at the day; and therefore rents should be accounted for on one side, and interest on the other: but then that would be on the ground that the purchaser ought to have taken the estate without a title, for none was ready at the day: therefore the only fair mode is to give the purchaser his interest on his deposit down to the time when the title was cleared by the King's Bench judgment, the purchaser not being bound to take the estate till then.

"The defendant the purchaser must have his costs down to the time of hearing to be paid by plaintiff; and plaintiff must have his costs before the master because after the title was cleared by the King's Bench, there was no reason to quarrel with the title. The possession ought to be considered and the rents accordingly to belong to the purchaser from the rent day after the title was cleared in the King's Bench, viz., rent day in April, 1795; and the interest on the deposit money from the time of the deposit till then.

"Decree costs of the cause till first hearing, and interest of deposit to defendant out of his purchase money, subsequent costs to be paid by him to plaintiff, and residue of purchase money with interest subsequent to the day from which he is let into receipt of the rent."

*Lincoln's Inn,*  
*Hall, 29th*  
*June.*

**HICKMAN against BACON.**

(Reg. Lib. 1792. A. fol. 587.)

Money was to be laid out in land, to be settled to the husband for life; remainder to raise portions for younger children; the money was afterwards invested, by direction of the husband, in S. S. annuities; afterwards by will he devised generally all his manors, &c. to certain uses; the money in the funds must be laid out in land. (1)

[ \*334 ]

**BY** indentures of lease and release, the release dated 12th of September, 1746, being the settlement previous to the marriage of Sir *Nevil George Hickman* with *Frances Elizabeth Tower*, reciting that by the settlement made previous to the marriage of *Christopher Tower*, with *Jane* his late wife, (the father and mother of the said *Frances Elizabeth*) there was provided, in case of there being two daughters and no more, between them, (which event happened) for such two daughters, the sum of 14,000*l.* to be paid at such times, and upon such contingencies as are therein mentioned; and it was declared and agreed by the said indenture of 1746, that all and every sum and sums of money, which she the said *Frances Elizabeth* then was, or at any time thereafter should become entitled to, should be paid to the trustees therein named, in trust that they should, as soon as a convenient purchase could be found, lay out the same in one or more purchase or purchases of freehold estates in *England*, and settle the same upon the trusts therein mentioned, viz. to the use of the said Sir *Nevil George Hickman*, for life *sans* waste, remainder to trustees to preserve contingent remainders, remainder to the intent Lady *Hickman* might receive a rent charge of 800*l. per annum*, remainder to the use of the trustees for raising portions for younger children of the marriage, remainder to the use of the first and other sons in tail male, remainder to the said Sir *Nevil George Hickman* in fee; with a power to the trustees, to invest the money in real securities, until such purchase should be made. The marriage between Sir *Nevil George Hickman* and *Frances Elizabeth Tower*, soon after was solemnized, and Lady *Hickman* died in 1763, without having any issue male by the said Sir *Nevil George Hickman*, [\*] but having had issue by him three daughters (viz.) the Plaintiff and *Rose Elizabeth*

(1) See *Pulteney v. F. Darlington*, *antra*, 1 vol. 223. et seq.

*Hickman,*

*Hickman*, afterwards the wife of *Thomas Baker*, Esq., and *Ann Hickman*, who died shortly after her birth.

By a decree of this court, made the 27th February, 1775, it was ordered that the sum of 14,000*l.*, being the fortune of the said Lady *Hickman* and *Jane Tower* her sister, (afterwards Lady *Beauchamp*), the two daughters of the said *Christopher Tower* and *Jane* his wife, with such interest as therein mentioned, should be raised by sale or mortgage of the premises, and that one moiety of the said sum of 14,000*l.* should be paid to the surviving trustee upon the trusts of the said settlement of the 12th of September, 1746.

*Christopher Tower* a defendant in that cause paid 7000*l.* a moiety of the said 14,000*l.* to the surviving trustee, who, by the direction of Sir *Nevil George Hickman*, laid out the same in the purchase of 8812*l.* 17*s.* 10*d.* New South Sea annuities, and by deed bearing date 14th February, 1778, declared the same to be subject to the trusts of the settlement.

The plaintiff, by her bill, insisted that, upon the death of the said Lady *Hickman*, without issue male by the said Sir *Nevil George Hickman*, he became absolutely entitled to the said sum of 7000*l.* so invested in the New South Sea annuities, by the settlement directed to be laid out in lands, to be settled as aforesaid; and that the said Sir *Nevil George Hickman* not having done any act whereby the said sum of 7000*l.* should be deemed part of his personal estate, the same should be regarded in equity as part of his real estate.

She further stated that Sir *Nevil George Hickman*, being so entitled, made his will dated the 6th May, 1771, executed and attested as the law requires for passing real estate, whereby, amongst other things, he gave and devised all his manors, messuages, lands, tenements and hereditaments in England, in possession, reversion, remainder, expectancy or otherwise, howsoever, with their appurtenances, (by which words, the sum of 7000*l.* being in equity, to be deemed in the nature of real property as aforesaid, passed and was well devised) to his eldest daughter the plaintiff for life, remainder to trustees to support contingent [\*] remainders, with remainder to her first and other sons in tail, with remainder to her daughters, as tenants in common, with remainder to Francis *Whichcote* in fee, and appointed the plaintiff; and the said Francis *Whichcote*, executors.

The testator died 25th February 1781, without revoking his will, and the executors proved the same.

The plaintiff insisted that, by virtue of the will, she became entitled for life, with remainders over to her issue, to the said sum of 8812*l.* 17*s.* 10*d.* New South Sea annuities, purchased with the said sum of 7000*l.*; that Francis *Whichcote* became entitled to the remainder in fee thereof, subject to the interest of the plaintiff and her issue therein, and stated that she (the plaintiff) had, afterwards, purchased the interest of the said Francis *Whichcote* therein; she further stated that the said Francis *Whichcote* is since dead, whereby she is become the only surviving executrix and personal representative of the said Sir *Nevil George Hickman*; that she is unmarried, so that there is no tenant in tail in being, of the said estates, devised by the said Sir *Nevil George Hickman*, but that the plaintiff is tenant for life, of the said Sir *Nevil George Hickman*'s real estates, and particularly of the said money.

She then stated the claims of the material defendants, to the said sum of 8812*l.* 17*s.* 10*d.* New South Sea annuities, and that they pretended that the same ought to be considered as money, and that the same vested in the said Francis *Whichcote* and the plaintiff, as the executors of the said testator, as being part of his personal estate undisposed of, and that the same did not belong to the said tes-

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tator's next of kin, but that the said testator's executors took the same beneficially, and therefore they claimed a moiety of the said 8812*l.* 17*s.* 10*d.* and interest thereof, as representatives of the said *Francis Whichcote*.

The plaintiff charged that 8812*l.* 17*s.* 10*d.* was to be considered as real estate: but that if the same was to be considered as part of the personal estate of the said *Sir Nevil George Hickman* not specifically disposed of by his will, and therefore vested in his executors, yet she insisted that she and the said *Francis Whichcote* became entitled thereto, as joint tenants, and that upon his death, his interest therein survived to the [\*] plaintiff; and also charged that all the right and interest of the said *Francis Whichcote* was assigned by him to the plaintiff, by the purchase deed above mentioned.

The bill prayed that the said sum of 8812*l.* 17*s.* 10*d.* might be decreed to be laid out in the purchase of lands, and to be taken as part of the real estate of the said *Sir Nevil George Hickman*, and, as such, to vest in the plaintiff, and that the interest and dividends to accrue on the said *New South Sea* annuities, until the same shall be so laid out, might be paid to the plaintiff.

*Mr. Attorney General*, for the plaintiff, stated the settlement and the decree, and that under it the money had been laid out, and the will of *Sir Nevil George Hickman*, and said that the question under these several instruments, was, whether this was real or personal estate of *Sir Nevil George Hickman*. By his will, he gave his whole real estate to the plaintiff, his eldest daughter, for life, with remainders to her issue, he then disposed of his personal estate, and appointed executors. If this will was such as to pass this as personal estate, there was no legacy to the executors, or any thing else, to prevent its passing to the executors as such; there is nothing to make their taking it inconsistent. If that proposition is made out, the plaintiff and *Francis Whichcote* took it as joint-tenants, and *Francis Whichcote* having done no act to sever the joint-tenancy, the plaintiff must take it as survivor. *Perkins v. Baynton*, (*ante*, vol. i. p. 118.) executors take as joint tenants, and there being no disposition of the residue, will not vary it. If it continued real estate, it descended to the plaintiff; and not having been treated as personalty, it was to be considered as real, and the lands to be purchased, passed.

*Mr. Lloyd* for the defendants. It has been held that money to be laid out in lands, will pass by the word *hereditaments*, *Rashleigh v. Master*, (*ante*, vol. iii. p. 99.) but here it may be considered as personal estate of *Sir Nevil George Hickman*; he could by any act have made it personalty, *Edwards v. Countess of Warwick*, 2 Wms. 171. *Chichester v. Bickerstaff*, 2 Vern. 295., which case was approved by Lord *Thurlow*, in *Pulteney v. The Earl of Darlington*, (*ante*, vol. i. p. 223.) which was reduced to a case of evidence. Money so to be laid out continues [\*] personalty till invested; the trustee laid it out in stock, by the direction of *Sir Nevil George Hickman*.

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*Lord Chancellor*. At that time, the daughters were entitled to it as land, to secure their portions. They had a right to call upon the trustees to lay it out in land, to enlarge their security for their portions.

The money must be laid out in land. (2)

(2) Upon the present occasion the court only directed inquiries as to how, and in what manner, and upon what securities the *N. S. S.* annuities had from time to time been invested, and by whom the interest or dividends thereupon had been received, and whether the same was so invested and continued on such securities with the consent of *Sir N. G. H.*, and whether any order, deed, or writing was signed, and by whom on that occasion: and whether *Sir N. G. H.*, made any declaration, or did any act, matter, or thing, touching the laying out, or the application of the said *N. S. S.* annuities. *E. L.*

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GLOVER *against* SPENDLOVE.

(Reg. Lib. 1792. A. fol. 558. b.)

*Lincoln's Inn  
Hall, 29th  
June, 1st July.*

**R**OSSITER LENTON being seised of freehold and copyhold estates, (the copyhold being surrendered to the uses of the following settlement,) by indentures of 18th and 19th May 1724, being the settlement previous to his marriage with *Annabella* his wife) conveyed certain premises to trustees, to the use of himself for life, *sans waste*, remainder to *Annabella* for life, remainder to the first and other sons of the marriage in tail male, with remainders over, remainder in fee to himself.

*Devise of lands  
not in settle-  
ment, will pass  
the reversion of  
the settled  
lands. (1)*

There was no male issue of the marriage, but there were five daughters, viz. the three plaintiffs, *Mary* the mother of the defendant, (who, as well as her husband is dead) and *Annabella* also deceased.

*Rossiter Lenton* sold some part of the settled estates, but was at the time of making his will and codicil, and at the time of his death, seised of the reversion in fee of several of the estates so settled upon his wife for life, and by his will and codicil, dated 3d December 1739, and 5th February 1742, (duly executed and attested, to pass real estates) gave and devised to his five daughters and their heirs, *all his lands* (2) *not settled in jointure* upon his wife, to be equally divided between them as tenants in common, and not as joint-tenants; but in case any of them should die before the age of twenty-one, unmarried, he gave her or their share to the survivors or survivor, and, by his codicil, taking notice of such devise, he revoked the same, and gave (3) all the said lands, not settled in jointure, to his said wife and her heirs, in trust, to sell the same, [\*] and out of the money to arise from such sale, to pay to his said daughters, or such of them as should be alive, such proportions as she should think proper; and in case his wife should die (as in fact she did) before such sale, then he gave the same to his eldest daughter *Mary* (the mother of the defendant, since deceased,) in trust, to sell and make an equal division between herself and his other daughters who should be then alive.

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The testator died soon after making the said codicil, leaving his wife and his said five daughters. The widow died 3d December 1779, without having sold the premises, and *Mary* also died 20th June 1789, before sale, and *Mary* left the defendant, her only son, by *Samuel Spendlove*, her husband. *Annabella* (the daughter) died intestate and unmarried, 24th April 1790, and plaintiffs are her representatives, and they and the defendants are heirs at law of the testator, and of *Annabella*.

The bill prayed a sale of the premises both settled and unsettled. The objection raised by the defendant's answer against the sale of lands settled in *jointure on the wife*, was, that they were excepted, and did not pass by the devise; if they did, he wished for a partition, not a sale.

(1) It is quite settled that a reversion will pass under a general devise. See *Chester v. Chester*, 3 P. W. 55.; *Attorney General v. Vigor*, 8 Ves. 256.; *Church v. Mundy*, 15 Ves. 396., &c. &c.

(2) "*Lands, tenements, and hereditaments, in Q. and D., not settled in jointure upon his wife, and elsewhere in the county of Lincoln.*" R. L.

(3) "*All his said lands, tenements, and hereditaments, in Q. and D., or elsewhere in the county of Lincoln, not settled in jointure upon his wife, to his said wife, her heirs, and assigns, for ever, in trust to sell, &c.*" R. L.

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The only question, at the hearing of the cause, was, whether the words of the devise passed the testator's reversionary interest in the estates settled in jointure on the wife.

Mr. *Attorney General*, Mr. *Abbot*, and Mr. *Hall*, for the plaintiffs, contended, that though the particular estate was settled in jointure, the reversion was not, but passed by the will.

Mr. *Lloyd* for the defendant, said, the only question was, whether the whole estate in settlement was not distinguished from the other estates, and therefore not to pass.

Lord *Chancellor* said, he had no doubt upon the subject; that the reversion passed by the will; and therefore decreed a sale. (4)

(4) "His Lordship doth declare that *all the lands, tenements, and hereditaments, whereof the testator R. L., died seised, both those which were, and those which were not settled in jointure on his widow, did pass by his will and codicil.*" A sale was directed, &c. &c. R. L.

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[*Vide S. C.*  
2 Ves. jun. 191.]  
*Lincoln's Inn*  
*Hall, 1st July.*

There was a settlement on the marriage of husband and wife, of the wife's fortune, in the names of trustees, but no provision for the payment of dividends during the coverture: She left his house and afterwards lived in adultery: on bill filed by the husband to have the dividends, the Court would not decree the payment, without a provision for the wife (1), but, after ordering costs, &c. to be paid out of the accumulated dividends, ordered those to accrue in future to be paid into court. (2)

[\*] BALL against MONTGOMERY and Others.

(Reg. Lib. 1792. A. fol. 579. b.; entered *Ball v. Ainsworth*.)

**B**ILL filed by the husband against his wife, her mother, and trustees: — it stated that *Harris*, the father of the wife, by will dated 6th October, 1780, gave to his daughter *Harriot* (the wife) the interest of 5000*l.* 3 per cent. standing in his name in the Bank of England; 1000*l.* part thereof, which he declared to be in the 3 per cents reduced, for her support and maintenance, until she should attain her age of twenty-one years, and then he directed his executors to transfer the same to her: and appointed his wife the defendant *Sarah*, the defendant *Montgomery*, and *John D'Oyley*, executors:

That in December, 1781, (the said *Harriot Harris*, being then under age,) a treaty of marriage was entered into between the plaintiff and *Harriot Harris*, with the approbation of her mother, and it was agreed, that the said two sums should be transferred into the names of *Sarah Harris* and *Montgomery*, upon trust, that *after such marriage the dividends thereof should be paid to the plaintiff during his life*, and after his decease to uses therein named; and such transfer was made of the 4000*l.* 3 per cent. Bank annuities, although such transfer of the sum of 1000*l.* reduced Bank annuities, was accidentally omitted to be made; and an indenture was prepared, and executed by all parties, with intent to declare the trusts with respect to the said two sums (but by mistake, the said two sums were therein described as one sum of 5000*l.* 3 per cent. consol. an-

but, after ordering costs, &c. to be paid out of the accumulated dividends, ordered those to accrue in future to be paid into court. (2)

(1) See Lord *Loughborough's* explanation of his reasons for this part of the decision, 2 Ves. jun. 682.

(2) That the court will not interfere in such cases of a wife's delinquency, in general. See per Lord *Hardwicke C.*, in *Watkins v. Watkins*, 2 Atk. 97., and *Carr v. Eastbrooke*, 4 Ves. 146. It is however to be noticed that the case is different as to a female ward of the court: for it seems that in such a case the court will enforce a settlement notwithstanding her adultery. See *Ball v. Coutts*, 1 Ves. and Beam. 292. 302, 303, 304., and 1 Roper on Bar. and Feme. 272, 273. Upon other points connected with the question, See *De Mandeville's case*, 10 Ves. 52. 56., &c. *Guth v. Guth*, anted, 3 vol. 614., and the Editor's notes, 3 Ves. 360., *Yeo v. Yeo*, 2 Dick. 498., &c.

nuities.)

nuities,) and it was therein mentioned, that such sum of 5000*l.* was transferred, and it was witnessed, that in consideration of the marriage, &c. *Sarah Harris* and *Montgomery* declared that the same was transferred in trust, *after the solemnization of the marriage*, that they should pay the dividends to the plaintiff during his life, in case he should survive his said then intended wife, notwithstanding she should die without issue, and without attaining twenty-one; and provisions were made in case of the plaintiff's death, with or without issue, and that in case he should die without issue, the same was to revert to *Harriot Harris*, as if she had continued sole; and power was given to her in that event, to dispose of the same by will: but through accident or inattention [\*] no declaration was made by the said indenture, according to the said agreement, that after the marriage the dividends should be paid to the plaintiff, during his life;

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The bill further stated that the marriage took effect, but there was no issue:

That *Harriot*, the plaintiff's wife, attained her age of twenty-one, the 15th of May, 1785, and by a deed poll dated 1st June, 1785, taking notice of the settlement, and reciting the power of appointing the said sum, in the event of her dying without issue, she gave, limited, and appointed the said sum (by mistake called 5000*l.* consol. Bank annuities,) to the plaintiff, absolutely:

That the plaintiff and his said wife lived happily together, till the beginning of the year 1788, but in the month of March in that year, the defendant *Harriot*, in consequence of mis-representations from some of her relations, and without any provocation on the part of the plaintiff, and without his leave, and against his will, left his house, and hath ever since been separate and a-part from him.

The bill further stated that the 4000*l.* 3 per cent. consols, were transferred into, and remain in the names of said *Sarah Harris* and *Montgomery*, but the 1000*l.* reduced annuities remain in the name of *Harris* the testator, and the intermediate dividends have been received by the trustees, but have not been paid to the plaintiff.

The bill charged that the dividends ought to have been paid to plaintiff, in right of his wife, and further charged that the wife lived in a state of adultery with another man, (by whom she had had a child), and that the plaintiff had recovered a verdict of 20*l.* in an action brought against such man in the Court of King's Bench; and that his wife had exhibited a libel against him in the arches court of *Canterbury*, praying that the marriage might be annulled and declared void; which suit had been dismissed, and that he had been put to an expence of 520*l.* for the costs of such suit.

The bill, therefore, prayed an account of the money received by the trustees for interest of the funds, and that they might [\*] pay the same to the plaintiff, and that the principal funds might be transferred to the Accountant General, in order that the plaintiff might receive the dividends for life; and for an injunction to restrain the trustees from receiving, and the bank from paying to them the future dividends.

[ \*341 ]

The defendant *Harriot*, the wife, by her answer, swore, (and was supported by the answer of her mother, as to this) that the agreement previous to the settlement, was, that the whole of the dividends of the 5000*l.* should be paid to her separate use during her life, notwithstanding her coverture, and not that the plaintiff should receive them for life, as stated in the bill. She admitted the deed poll, but said, when she executed it, she did not know the nature of her interest, and that the plaintiff told her it would be for their mutual benefit, and would enable him to give her the property, in case they had no children, and he gave her a writing, purporting to be a will, by which he gave her the 5000*l.*

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in case there should be no children; which he represented to be of the same effect as the instrument executed by her. She also stated very cruel treatment, and personal violence, by which she had been compelled to leave the plaintiff's house, and that, from that time, he had never offered her any maintenance, and that her mother being married to a second husband, (the defendant *Ainsworth*) she was left in a great measure destitute of support, and having been compelled to separate herself from plaintiff, by his cruelty and ill usage, not in consequence of any crime committed by herself, she hoped the Court would not interfere to put plaintiff into possession of her property.

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By her answer to the amended bill, she stated that the settlement was prepared under the direction of her mother, and by her solicitor, but said it was a part of such direction that the dividends should be paid to her separate use, during the coverture. She admitted the suit in the ecclesiastical court, and that she executed two deeds of appointment, but said, for the same reason as she had stated in her former answer, she might have been prevailed upon to execute any number of deeds the plaintiff might have produced to her; that she did not give any instructions for preparing the said deeds, or if she did, they were such as were suggested to her by [\*] the plaintiff, and that she did not know the nature of the property she was disposing of. That whilst she lived with the plaintiff he had no ground to impeach her conduct, and that the situation she was then in, she had been driven to by the plaintiff, and compelled by his usage to leave his house, and by his having left her without any maintenance.

The criminal connection of the wife was in evidence, but there was a variety of evidence as to the treatment of her by the plaintiff. There was also evidence of her having willingly executed the deed poll in favor of the plaintiff.

Upon the mother's evidence being offered, it was objected to. as she was a trustee.

Lord Chancellor over-ruled the objection.

Mr. Attorney and Mr. Solicitor General, for the plaintiff, stated the case, and the evidence as amounting to this—that the marriage had been with the full consent of the mother, and that the agreement, as stated in the bill was proved, and that the mother had sown the seeds of discord between the husband and wife, in consequence of the wife having executed the deed in favor of the husband: that the wife had eloped from the husband, and lived in adultery, and had brought a suit in the ecclesiastical Court, by which she had put the husband to great expence upon a disgraceful charge; and argued that the settlement not having specified the uses to which the dividends were to be applied, during the coverture, there was no equity resulting to the wife: that in *Alexander v. M'Culloch*, (3) Lord Thurlow would not give the wife any part of the interest, without the husband's consent, though he had used her very ill.

Mr. Mansfield, Mr. Grant, and Mr. Hart, for the defendants.

The first question is whether the husband has any claim to the dividends.

The second whether the Court will permit him to take them without making a provision for the wife.

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[\*] The 5000*l.* was the property of the wife transferred to trustees, and the use, during the coverture, not being declared, it must result to her, as whatever is undisposed of must result to the grantor. A trustee having been appointed, and no uses declared, parol evidence is

(5) See the Rep. 2 Ves. 197., Mr. Ves. jun.'s note, in *De Manneville's case*, 10 Ves. 56., states this to be the case alluded to by Lord Eldon, *ibid.* under the title of that of Dr. Douglas.

admissible

admissible to shew for whom the use was intended, and here is evidence that it was intended for the separate use of the wife: the mother, who gave the instructions, swears it was so intended. The husband would be bound to make out that the use was intended for him, during the coverture, which he has not done; and as the use resulted to the wife, it could not result to her for the use of the husband.

The second question is, whether the common equity applies here?

If a husband obliges his wife to leave him, the Court will compel him to give her a separate maintenance; and where the property is originally her own, it will not permit him to take it without making a provision. The wife might have filed a bill for a maintenance. *Oxenden v. Oxenden*, 2 Vern. 493. *Nicholls v. Danvers*, 2 Vern. 671. *Williams v. Cullow*, 2 Vern. 752. *Head v. Head*, 3 Atk. 295. 547. [1 Ves. 17. and Suppl. 18.] where there were express agreements that the husbands should have the interest for life, but the wives separating from good cause, had the interest decreed to them. It is said it cannot be without the consent of the husband; but the Court has done more, it has ordered money to be brought into Court for the use of the wife, *Bond v. Simmons*, 3 Atk. 20. Then the question is, whether her conduct shall prevent the Court from decreeing her the interest. The good cause for leaving the husband is to be considered at the time of leaving him, and is not affected by her subsequent conduct, *Sidney v. Sidney*, 3 Wms. 269. Here it is not pretended that she eloped with an adulterer, or even that she knew him at the time, or that there was any thing in her conduct, whilst with the husband, to induce him to use her ill. There was no motive for her withdrawing from him but his ill usage.

Lord Chancellor. (4) I must entertain this bill. The eventual right of the husband I cannot now decide upon. I think nothing can be done in this suit. Upon an application for the purpose, [\*] I might decree the dividends to her separate use. It is argued that there was an omission in the settlement: but the settlement is intelligible; there was no necessity to provide for the payment of the dividends during the coverture, because they would be payable to him in her right. I cannot enter into their conduct whilst they lived together; she has deserted her husband's house, and lives in adultery. Then as to the dividends which have accumulated, the costs of this suit must be first paid out of them, and then the costs of the suit in the ecclesiastical court. I should have done this if it had been her separate property. Then, as to the future dividends, they are actually separated: the ground of jurisdiction on which the Court will not permit the husband to take the whole, does not depend on the conduct of the party, but is because the fund is intended for the mutual maintenance of both, if they live together; therefore, to give the whole to one, is to defeat the intent. I cannot give it to her whilst living with an adulterer, in order to enable her to continue in that state: I can only direct the dividends to be paid into Court.

Mr. Attorney General, in reply. That will be going further against my client than has been the practice of the Court. As to the future dividends; there has been no case in which the husband has been entitled to the dividends by contract, that the Court has interfered to prevent his taking them. In the case before Lord Thurlow there was no contract; but if the parties, previous to the marriage, make a contract, giving the interest to the husband, he has a right to come upon that contract. So if, by the contract, it is to be for the wife's separate

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(4) See the Lord Chancellor's observations and judgment, as reported 2 Ves. 194, 195, 196. 198, &c. See that report generally, as preferable to the above.



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use; her conduct will not affect it. I cannot resist the payment of the costs in the ecclesiastical court; but the mother ought not to have her costs; she does not come here as trustee; she comes insisting upon that which cannot be true: she says the settlement was prepared under the direction of the plaintiff, which is contradicted by the other witnesses.

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They lived together from 1781 to 1788, during which time the husband received the dividends in his own right, not by her permission. Suppose there had been then an agreement to part, which the parties had afterwards waded, there must have been a new agreement to give the Court jurisdiction: so Mr. [\*] Justice *Buller* thought, in *Fletcher v. Fletcher* (*ante*, vol. iii. p. 619. note). Here she left the husband in 1788, and lived in adultery. If she has left him unjustifiably, and is living improperly, shall she cut down her own contract? This would be a very evil example; especially as she would have been entitled to the whole benefit, notwithstanding her ill behaviour, if the contract had given it to her separate use: this is a case in which the ecclesiastical court would not give alimony.

Lord *Chancellor*. I can make no distinction between this case and that of a sum of money so given that the husband could not obtain it but by coming to this Court, which is the case wherever a woman is entitled without an appropriation. The delinquency of the woman is, in this case, a reason for not giving it to her; and I cannot give the whole to him on account of her interest. I must secure a part for her, or reduce her to beggary. This will lead to an agreement to make a provision for her.

The costs (5) must be deducted out of the accumulated dividends.

(5) Including those in the Ecclesiastical Court. The future dividends to be paid into court, subject to further order. R. L. and the report 2 Ves. 199.

### SIMMONS and Others against VALLANCE and Others.

Rolls, 1st July.

(Reg. Lib. 1792. B. fol. 579.)

Legacies of New South-Sea annuities declared to be pecuniary, not specific; though the testator had more of that stock than sufficient to pay them. (1) Child born after death of the testator decreed to take under a general gift to A. for life, then to the children of A. but this point not contested. (2)

**JOHN SIMMONS**, by his will dated 25th November, 1778, after directing his debts to be paid, gave all the rest and residue of his effects to be disposed of in manner following: that is to say; he gave and bequeathed to plaintiff, *Caleb Simmons* the elder, the interest of 100*l.* New South-Sea annuities, during his natural life, and, after his death, to be equally divided amongst his children; and he gave and bequeathed unto each of his plaintiff *Caleb Simmons* the elder's children, living at the said testator's decease, the sum of 50*l.* each, New South-Sea annuities; the interest to be paid from the time of his decease, and the principal when they should be of age. And he gave unto defendant *Joshua Simmons* (his brother) the interest of 100*l.* New South-Sea annuities, for life, and, after his decease, to devolve to his uncle *Caleb White* (deceased); and he gave unto defendant *Samuel Simmons*

(1) See 1 Roper on Legacies, 21. *et seq.*, *Ashburner v. M'Guire*, *ante*, 2 vol. 108, &c., with the references in the Editor's notes.

(2) *Vide Congreve v. Congreve*, *Demsme v. Mells*, and *Gilmore v. Severn*, *ante*, 1 vol. 530. 537. & 582, with the Editor's notes upon each of them.

100*l.* principal money; likewise to his eight children 400*l.* to be [\*] equally divided among them; and he gave to *Wood*, and *Wood* his wife 10*l.*, and he gave the residue to *Caleb White*, and appointed him executor.

The testator died without revoking his will, and *Caleb White* the executor proved the same.

*Caleb Simmons* had five children (who are co-plaintiffs) at the time of the death of the testator, who became entitled to the legacies of 50*l.* each, *South-Sea* annuities; and he had a son *Richard* (also a co-plaintiff) who claimed with them to be entitled to a share of the 100*l.*, of which the interest was given to *Caleb* the elder for life after his decease.

The testator was possessed of considerable property at the time of his decease, and particularly of the sum of 800*l.* *New South-Sea* annuities, which came to the hands of the executor, who, out of the other personal property, paid his debts, &c. and reserved the said 800*l.* *New South-Sea* annuities, for the purpose of discharging the said legacies to the plaintiffs when they should become due: and the said 800*l.* *New South-Sea* annuities were standing in the name of the testator at the time of the death of the executor, but he, during his life, paid the interest for the use of the plaintiffs.

*Caleb White*, the executor, made his will, disposing of his own property, and of the sum of 350*l.*, part of the said 800*l.* *New South-Sea* annuities, and appointed some of the defendants executors.

A bill was filed by the plaintiffs, stating the above and other facts, and raising questions not afterwards agitated, and praying that their legacies might be secured.

The only question at the hearing was, whether the legacies of *New South-Sea* annuities were specific or general legacies; and if the latter, to abate, the fund not being sufficient for payment of all the legacies.

Mr. *Lloyd* and Mr. *Pemberton*, for the plaintiff, argued that they were specific legacies; that where a testator gave a legacy out of stock, he could never mean that it should be money legacy, it is [\*] more natural to hold it a description of the specific property. In general the word *my* is used; and where the testator has used the word *my* in one legacy, and has omitted it in the subsequent ones, that made a very strong case: but the defect of the word *my* may be supplied by equivalent words. There is not a single case in which stock is described, and the testator had the stock when he made the will, and at the time of his death, where it has been held pecuniary. They cited *Avelyn v. Ward*, 1 Ves. 420. *Ashton v. Ashton*, Forrester, 152. 3 Wms. 384., which turned on the direction to sell, as is mentioned in *Sleech v. Thorington*, 2 Ves. 564.

Mr. *Ainge*, Mr. *Graham*, and Mr. *Scafe* for the defendants, argued that they were pecuniary legacies, and cited for that purpose *Partridge v. Partridge*, Forest. 226. *Purse v. Snaplin*, 1 Atk. 414. *Sleech v. Thorington*, 2 Vesey, 560. *Brunsdon v. Winter*, cited in *Jefferys v. Jefferys*, 3 Atk. 122, 123. also Amb. 57. *Attorney General v. Parkin*, Amb. 566. *Cartwright v. Cartwright*, 8th July, 1775. 3 Wooddeson, Syst. View, Ap. p. 8. *Bishop of Peterborough v. Mortlock*, (ante, vol. i. p. 565.) *Cock v. Benburrough*, Rolls.

It stood over till this day, when his Honor gave judgment to the following effect.

*Master of the Rolls*.—The question is, whether certain legacies of *New South-Sea* annuities are specific or general legacies.

The testator made his will 25th November, 1778, and the words are as follows (here his Honor stated the will as before). The testator had at the time of his death 800*l.* *New South-Sea* annuities standing in his name. It is not stated that he had them at the time of making the will, but

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but I suppose he had them at that time. Then the question is, whether these legacies are specific legacies, or they are general legacies, and shall abate in proportion.

It has been insisted, that it must have been the intention of the testator, that the identical stock should be transferred to the objects of his bounty, and *Avelyn v. Ward* has been cited to shew that when a testator gives a legacy of stock, and has as much [\*] or more of the same stock, there the legacy shall be specific. I looked into the Register's book, to see whether there were any particular circumstances in that case, to shew it was *that* stock he meant to give, but it seems as if Lord *Hardwicke* thought that having the stock was sufficient: there is no other circumstance. Lord *Hardwicke* there being pressed with *Partridge v. Partridge*, said it was not necessary for him to determine what would be the consequence of the testator's having sold out the stock; but here I differ from him, for it is impossible the legacy should be at the same time specific and general, and that if the testator has more stock it shall be specific, and if he has sold it, it shall be general, and be to be laid out for the legatees.

In *Ashton v. Ashton*, the testator gave to trustees 6000*l.* *South-Sea* annuities, to sell and lay out the money in lands. He could not mean that 6000*l.* annuities should be purchased, and then sold out, that the money might be laid out in lands. He did not mean to give as much money as 6000*l.* annuities was worth: therefore Lord *Talbot* held it to be a specific gift.

In *Partridge v. Partridge* in the same book, it was held not to be the particular stock that he gave, but a description of the property. If he had not had it, it would have been a direction to the executor to purchase that quantity of stock.

In *Purse v. Snaplin*, Lord *Hardwicke* lays down the rules as to specific legacies to be; 1st, Where a specific chattel is specifically described; 2dly, Something that the executor may satisfy. — The first he calls an individual legacy, and that it must fail if it is not found among the testator's effects. But he says, the gift of 5000*l.* was not confined to the 5000*l.* *Old South-Sea* annuities, he had, but was a legacy of quantity and number, and the testator then having given 5000*l.* *South-Sea* stock to the niece, and 5000*l.* to the nephew, and having only 5000*l.* stock, he held that it meant the same quantity of the same stock, and ordered the stock to be purchased for the legatees.

In *Lawson v. Stich*, 1 Atk. 507. it was a gift of 500*l.* to remain on such securities as he should leave. He had a mortgage of 500*l.* A case of *Philips and Carey*, 14th May, 1728, was cited, but Lord *Hardwicke* held it not to be a specific legacy.

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[\*] In *Jefferys v. Jefferys*, 3 Atk. 120. *Brunsdon v. Winter* was cited, it is also reported in *Ambler*, and I have a note of it taken by Mr. *Ford*; the statement is nearly the same in both: that case seems to shew that he did not mean the identical stock, for this was to be sold. Mr. *Ford*'s note ends with saying, that the Court has been against holding legacies to be specific, which is the same rule as prevailed in *Purse v. Snaplin*, as the legatee may lose the whole of the testator's bounty, by a mere alteration of a part of the property. — And this is on a good ground, unless where the case shews the gift was specific. *Sleech v. Thornton*; *Drinkwater v. Falconer*; 2 Ves. 623. *Ellis v. Walker*, Amb. 309.

*Bishop of Peterborough v. Mortlock* does not apply, as in that case the testator had not so much as he disposed of. In *Ashburner v. Macguire*, Lord *Thurlow* expressed a different opinion from *Avelyn v. Ward*, which indeed is contrary to several cases, and in particular, to *Purse*

*Purse v. Snaplin.* The cases are brought together in the notes on Mr. Wooddeson's third volume, p. 531 and 535.

If it is true that the Court leans against specific legacies, I do not see enough here to shew he meant the legacies to be of the specific stock. There must be something more than having stock enough to make it specific.

*Blackshaw v. Rogers*, 12th July, 1778, 25th July, 1780, was upon the manner in which legacies of stock shall abate, as to time; Lord Thurlow thought where the legacies were general, they ought to abate according their value at one year after the testator's decease. There the testator gave 200*l.* consol. annuities to *J. Rogers*, to keep a monument in repair, the surplus to be the property of *Rogers*: by codicil, he ordered the executors to pay the interest of 300*l.* to *Margaret Cooper* for life, and after her decease, the principal to sink into the residue. The Master found that the legacies had never been set apart, but stood in the testator's name, who had much more than the amount of the legacies in his name at the time. When the cause came on for further directions, Lord Thurlow decreed, that the personal estate being deficient, *J. Rogers* and *Margaret Cooper* must abate in [\*] proportion, and that the Master must enquire into the value of the stock at one year from the testator's death.

That is not distinguishable from the present case, as Lord Thurlow held them to be general legacies.

I think, therefore, on the authorities, that these are general legacies. As to those which carry interest from the time of the testator's death, their value must be taken then; and as to the others, at the end of a year from the testator's death.

The decree therefore declared, that the legacies of *New South-Sea* annuities were not to be considered as specific legacies; and it appearing that the testator's estate will not be sufficient to pay the whole of the legacies given by his will, that the legatees of the *New South-Sea* annuities ought to abate in proportion among themselves and the pecuniary legatees, in proportion to their respective legacies, as follows: as to the legacy of 100*l.* of the said annuities, [the interest whereof is] given to plaintiff, *Caleb Simmons* the elder, and the legacy of 100*l.*, [the interest whereof is] given to defendant *Joshua Simmons*, according to the value of the said *New South-Sea* annuities, at the end of one year after the death of the said testator, and as to the rest of the legacies of *New South-sea* annuities, according to the value thereof at the death of the testator: that *Richard Simmons* (the after born son) will be entitled, with his brothers and sisters, to an equal share of the legacy, the interest whereof is given to the plaintiff, *Caleb Simmons*, his father, during his life; and proceeded to direct the proper accounts, (3) &c.

(3) " And with his said brothers and sisters, and the children of *S. S.* the elder, to the legacy of 100*l.* like annuities, the interest whereof is given to the defendant *S. S.* for life." R. L.

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[Vide S. C.  
2 Ves. jun. 199.]Lincoln's Inn  
Hall, 3d July.

An attorney cannot take from his client a bond for unliquidated costs. Notwithstanding such bond and a mortgage has been given, the bills may be taxed, and upon payment the defendant to reconvey, and the bond declared void. (1)

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NEWMAN and Others, against PAYNE.

(No Entry.)

THE plaintiff *Newman*, who was entitled to a reversionary estate for life, in certain premises, subject to the life of his uncle, had employed the defendant from 1782 till 1791, as his attorney. No regular bills were delivered; but in 1782 the plaintiff gave to the defendant a promissory note, to pay defendant 1000*l.* after the death of his uncle, for business done, or to be done by him afterwards; and this sum was [\*] afterwards secured by a bond; the defendant sold to the plaintiff a horse for 150*l.* likewise to be paid at the death of his uncle; in 1787 plaintiff gave to the defendant a mortgage on his reversionary estate, for 802*l.* 10*s.* and interest, and also of 1757*l.* 10*s.* payable on the death of his uncle; and by a further mortgage in 1789, he charged the estates with 421*l.* and interest, as a further security for business done, or to be done, and for the value of the horse.

The defendant had also been employed by the plaintiff in the receipt of rents of estates, which were charged not to have been accounted for.

The plaintiff having been obliged to assign his estates to trustees for the benefit of his creditors; and the defendant claiming a sum of 1300*l.* and odd pounds on these securities, and that there would be due to him 1157*l.* 10*s.* upon the death of the uncle, upon the mortgage of 1787; the plaintiff and his trustees filed the present bill, to set aside the securities, and for an account.

After the hearing of the cause Lord *Chancellor* gave judgment to this effect.

I have had no doubt as to the relief in this case.

I do not go on any particular rule of equity, but upon a principle that would operate in the same manner in any court of law.

All courts will protect their suitors; and attorneys cannot act with respect to the parties from whom they are concerned, as other persons may do.

I have no doubt what a court of law would do. If, instead of the securities that had been given, he had taken a judgment, with a *cesset executio* during the life of the uncle, sitting in a court of law, I would have directed the judgment only to stand as a security for the real debt.

I consider it on the general outline of the case: *Newman* applied to *Payne*, in the year 1781; down to 1791, he was concerned [\*] in a number of actions, as an attorney and solicitor, and became receiver of his rents, and in the general management of his affairs; accounts were settled from time to time, with trifling balances.

*Newman* says he meant to make the defendant a present of 1000*l.* when he got into possession of the estate, and to give him a memorandum of his intention so to do; afterwards this memorandum becomes a bond, payable on the death of the uncle; and afterwards a positive security on the estate, by a term enacted for that purpose.

The case comes before the Court on three heads.

1st. The security for the 1000*l.*

2dly. On the securities given for the balances.

3dly. On the transaction as to the horse, which was valued at 100*l.* but sold for 150*l.* payable at the death of the uncle.

First as to the bond. — Taking it out of the case that it had, at first,

(1) See *Langstaffe v. Taylor*, 14 Ves. 262, &c.

been a different security, it cannot stand. An attorney cannot be permitted to take such a security; it was determined in the case of a bond given by *Crook* to *Booth*, (*Walmsley v. Booth*, 2 Atk. 25.) although that was not precisely the case of an attorney, that a bond cannot be given by a client to his attorney; Lord *Hardwicke* says, no advantage can be taken by an attorney of his client: in that case, he would not allow it to stand as a security for the money actually due. I have compared that note with Mr. *Forrester's*, and find it correct.

Upon the general policy of justice, arising from the relation of attorney and client, the Court will not suffer it to stand.

2dly. As to the bills of costs, they cannot be of an arbitrary amount, but must be such as to be ascertained; they cannot be so settled as not to be open to examination. Lord *Hardwicke* in *Walmsley v. Booth*, says, that, even after payment, an attorney's bill may be examined, and the account opened.

[\*] 3dly. As to the horse, I do not mean to impute any thing wrong. It might be of the value.

The Master must tax the bills of costs, and take an account of money lent.

Declare that the bond for 1000*l.* is void, and the security of no effect, and the Master must take an account of all dealings and transactions as agent; and upon payment of what is due, the defendant must reconvey and the Master must enquire what was the value of the horse; and reserve further considerations.

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VINCENT against STANSFELD.

HABERGHAM against VINCENT. (1)

(Reg. Lib. 1792. A. fol. 548. entered *Habergham v. Stansfeld*.)

**SAMUEL HILL**, by will bearing date the 5th October, 1759, devised as follows. "And first I give to my executors and trustees hereafter named, and to the survivor of them, all my personal estate and effects,

1. by will duly executed and attested, gives certain interests in his estates, and in default of the persons to whom given, gives the same to trustees to such uses as he should declare by any deed executed in presence of two witnesses: he by deed poll attested by two witnesses declares further uses: The first question was, whether the devise is good under the stat. of frauds. 2dly. Such devise being to the heir of the surviving trustee; whether the devise be good, either by raising an estate for life in the survivor by implication, or as a contingent remainder, or an executory devise. (2) 3dly. With respect to the copyhold, whether the executory devise be supported by the freehold in the lord. It was held by Lord *Loughborough*, Chancellor, assisted by Mr. Justice *Buller* and Mr. Justice *Wilson*. 1st. That the deed was a testamentary act. 2d. That it did not pass the real estate because not executed according to stat. of frauds. (3) 3dly. That it should pass the ultimate use of the copyhold as declaring the trust of the surrender. (4)

(1) See the previous stage of the cause 1 Ves. jun. 410., and some subsequent points determined by Lord *Eldon* C., 10 Ves. 273. *et seq.*

(2) See *per* Lord *Eldon* C., in *Stansfeld v. Habergham*, 10 Ves. 280, 281, &c.

(3) See in *Buckeridge v. Ingram*, 2 Ves. jun. 665, 666., *Smart v. Frajcan*, 6 Ves. 560, &c., *Bonner v. Bonner*, 15 Ves. 379., and *Ross v. Conynghame*, 12 Ves. 29. 38, &c. See also in *Sheddon v. Goodrich*, 8 Ves. 481. 498, 499, &c.

(4) See *Tuffnell v. Page*, 2 Atk. 37., and Barn. Rep. Ch. 9., which is a very good report of it. *Vide etiam* thereon, 1 Ves. 225., *Hargr. Co. Litt.* 111. b., and *Carey v. Ashaw*, *antea*, 2 vol. 58.

[*Vide* S. C.  
1 Ves. jun. 410.  
2 Ves. jun. 204.  
and *Stansfeld v.*  
*Habergham*,  
10 Ves. 273.]

Heard at several  
times before  
Lord *Thurlow*.

15th June,  
4th July,  
before Lord  
Chancellor  
*Loughborough*,  
assisted by  
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to be by them applied towards payment of my debts, legacies and other charges attending the execution of this my will : and concerning as well all my *copyhold* lands and estate situate in the *Graveship of Sowerby*, and manor of *Wakefield*, in the said county, (*which I have already surrendered to my trustees, their heirs and assigns, to and for such uses as I by my last will should declare,*) as also all my *freehold* messuages, tenements, cottages, mills, lands, fee farm and other rents and hereditaments whatsoever, situate, lying and being, or arising within *Sowerby and Hallifax* or elsewhere, in the said county of *York*, in whose tenures or occupations soever the same now are or be, I give and devise the same, and all my interest, title, and claim therein, unto *John Nuttall*, and *Robert Nuttall*, both of *Bury* in the county of *Lancaster*, merchants, *George Stansfield*, of *Sowerby*, aforesaid, merchant, *John Whitacre*, [\*] of *Longwood-house*, in the said county of *York*, merchant, and *George Ramsden*, of *Clifton*, in the said county of *York*, Gentleman, and the survivors and survivor of them, their and his heirs and assigns ; in trust, that they and the survivors and survivor of them, their and his heirs, do and shall, by sale or mortgage of my three messuages and tenements, called *Richard Scholfield's farm*, *Elkanah Hutchison's farm* and *Clayfields*, and by mortgage of the remainder of my freehold and copyhold estates, or of any part thereof, levy and raise such sum and sums of money as (with my personal estate,) will be sufficient to discharge all my debts and legacies, and enable my trustees to complete my purchase and agreement made with the assignees of my son's estate and effects. And upon this further trust, to pay into the hands of Mrs. *Susan Kay*, widow, and her representatives 50*l.* a-year, by half-yearly payments, to commence from my death, to be by her and them applied towards the maintenance and education of my grand-daughter *Betty Nuttall Hill*, until she attains her full age, or is married ; and likewise for my said trustees to pay into the hands of my son *Richard Hill*, for his support and maintenance, such sum and sums of money yearly, from my death, as they or the major part of them shall think proper, so as such payments do not exceed the yearly sum of 50*l.* and to be continued during his life, or until all my debts, legacies, and incumbrances affecting my estates are fully satisfied. And after payment thereof, then (and not before) my said trustees shall pay my said son during his life, such other sum and sums of money as they, or the major part of them, shall, in his or their discretions, think necessary for his better support and maintenance, so as such additional payments do not in the whole exceed the yearly sum of 100*l.* and to be in lieu of the said 50*l.*, and I do declare that what I hereby give to or for the use of my said son, is upon this condition, that he doth not in any wise intermeddle or concern himself with the education and fortune of his daughter, the said *Betty Nuttall Hill*, but leaves the same and the guardianship of her person, to the management of the said *Susan Kay*, (her grandmother,) and her representatives, during his said daughter's minority. And on my son's refusal to comply with the terms above, the said sum and sums of money hereby intended for his support, shall, from thenceforth, cease, and be afterwards applied towards

[ \*355 ] [\*] discharging of my debts, legacies, and other charges relating thereto ; and when the same are satisfied, and my real estate disincumbered (the testator then gave directions for building a bridge) and proceeded as follows ; " and as touching all my lands and real estate undisposed of by " my said trustees for the purposes aforesaid, my will and mind is, that " my said trustees, and the survivors and survivor of them, and the " heirs of such survivor, shall take and receive the yearly and other " rents, issues, and profits thereof, during the natural life of my son " *Richard Hill*, or until his said daughter shall attain her full age, or is " married, upon trust to pay and apply the same rents, issues, and pro-

" fits

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“ fits to the said Betty Nuttall Hill, at her full age, or marriage, which  
 “ shall first happen; and in case she should die before full age or mar-  
 “ riage, then in trust to pay and apply the same in such manner as is  
 “ hereinafter mentioned, and from and after the marriage of my said  
 “ grand-daughter, or her attainment to full age, my will and mind is, and  
 “ I do hereby order and direct, that my said trustees, and the sur-  
 “ vivors and survivor of them, and the heirs of such survivor, shall by  
 “ good and effectual conveyances and assurances in the law, well and  
 “ effectually convey and assure all and every my said real estate, (so  
 “ remaining unsold and undisposed of,) unto the said Betty Nuttall  
 “ Hill, and her assigns, during her natural life, without impeachment  
 “ of waste, remainder to some person or persons, and his and their  
 “ heirs, during the natural life of the said Betty Nuttall Hill, in trust  
 “ to preserve the contingent remainders hereafter limited, and from and  
 “ after her decease, to her first and other son and sons successively in  
 “ tail male in remainder, one after another, according to their seniority  
 “ of age and priority of birth, and for want of such issue, remainder to  
 “ the daughter and daughters (if more than one) of the said Betty  
 “ Nuttall Hill, as tenants in common, and the heirs of her and their  
 “ body and bodies lawfully issuing; and for want of such issue, my will  
 “ and mind is, and I do hereby order and direct that my said trustees  
 “ and the survivors and survivor of them, and the heirs of such survivor,  
 “ shall by the ways and means aforesaid convey and assure all and every  
 “ my said real estate so remaining unsold and undisposed of, unto and  
 “ for the use of such person or persons, and for such estate or estates in  
 “ fee simple, fee tail, life or lives, or years, or otherwise, and subject  
 “ and liable to such charges, provisoes, and conditions as I, by any  
 “ deed or instrument to be executed [\*] by me, and attested by two or  
 “ more credible witnesses, shall in that behalf direct, limit, or appoint,  
 “ and to and for no other use, intent, or purpose whatsoever; and as  
 “ touching the rents, issues, and profits of my real estate, which shall  
 “ remain unsold, and which I have hereinbefore directed to be received  
 “ by my trustees, during the life of my son Richard Hill, or until my  
 “ said grand-daughter Betty Nuttall Hill, shall attain her full age or  
 “ marry, now I do hereby will and direct, that in case my said grand-  
 “ daughter shall die in the life-time of my said son, under the age of  
 “ twenty-one years, and without having ever been married, then the  
 “ said trustees shall pay and apply the rents, issues, and profits of the  
 “ said estates by them received, during the life-time of my said son  
 “ Richard Hill, to the person or persons who shall be entitled next in  
 “ remainder to the said estate, on his, her, or their attaining full age,  
 “ and all interest for the same in the mean time.”

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The said Samuel Hill, by deed poll, dated 6th of October, 1759, (the day after the date of his will) and reciting his said will, directed as follows, “ I do hereby direct, that the said trustees, and the survivors, &c. shall immediately after the death of my said grand-daughter, and her failure of issue, by good and effectual conveyances and assurances in the law, well and effectually convey and assure all and every my said real estate so remaining unsold and undisposed of, unto the first son of the body of my son Richard Hill on the body of any woman he may hereafter take to wife, (save and except Ann Wylde, daughter of Edward Wylde, of Dean in the Graveship of Sowerby, and every other daughter of the said Edward Wylde,) lawfully to be begotten, and of the heirs male of the body of such first son lawfully issuing, and for default of such issue, to the second, third, fourth, and every other such son and sons of the body of the said Richard Hill, on the body of any such woman he may hereafter marry, and the heirs male of such son and sons lawfully issuing suc-  
 “ cessively;



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"cessively, and in remainder one after another, according to their seniority of age, and priority of birth, and in default of such issue, remainder to the daughter and daughters of the said *Richard Hill*, lawfully to be begotten by him on the body of such woman, to take as tenants in common, and the heirs of the body and bodies of all such daughter or daughters lawfully issuing; and for default of such issue, [\*] unto the right heirs of the survivor of my said trustees, his heirs and assigns for ever."

On the 22d of October following, the testator died, leaving *Richard Hill* his only son and heir at law. In 1767 *Betty Nuttall Hill* married, and she and her husband were let into possession. And *Richard Hill*, the son, having become a bankrupt, a bill was filed by the assignees against the trustees, for the purpose of paying off incumbrances due upon the estate, which are since paid, excepting one incumbrance of 11,200*l.* to the assignees. In 1772 *Betty Nuttall Hill* died without issue, and the surviving trustees (two) entered again into the possession of the estate, and in 1776, *Stansfeld* became the surviving trustee. In 1780, *Richard Hill* died intestate, leaving two children by *Ann*, his wife (as the plaintiffs in the original bill stated,) formerly *Ann Wylde* (the person excepted against in the deed poll, (*viz.* *Richard Holdroyde Hill* (since deceased) and *Amelia* (*Vincent*) his daughter. And in this state of the cause the original bill was filed, the further history of which appears in the speech of the plaintiff's counsel.

The cause was heard the 3d, 5th, and 6th of February, 1787, before Lord Thurlow.

Mr. Mansfield, Mr. Selwyn, and Mr. Johnson, for the plaintiffs in the second cause. The original bill in the present cause was filed by *Charles Vincent* and *Amelia* his wife, against *Stansfeld* and *Habergham*, claiming as heirs at law to *Samuel Hill*, praying an account of the rents from the death of *Richard Hill*, and to be let into possession of the unsold part of the estate; *Amelia*, insisting, that she was daughter of *Richard Hill*, who was son and heir at law of *Samuel Hill*, and after the death of her brother *Richard Holdroyde Hill*, became heir at law. The cross bill was filed by *Habergham* and his wife, against *Vincent* and *Stansfeld*, praying an account of rents of the estate and possession of the unsold part, and insisting that *Amelia* was not the legitimate daughter of *Richard Hill*, he never being married to the mother *Ann Wylde*, and that *Habergham's* wife and *Wylde* are the heirs at law of *Samuel Hill*, of which there is no question, if *Amelia Vincent* was not *Richard's* legitimate daughter. An issue was directed to try the question of *Amelia's* legitimacy, and being tried at York, there was a verdict against her legitimacy. This makes an end of the first bill, which must be [\*] dismissed, and leaves the title of Mrs. *Habergham* and *Wylde* undoubted, as heirs at law of *Samuel Hill* the testator. The sole remaining question is between them and *Stansfeld*, the surviving trustee under the will and codicil of *Samuel Hill*. *Samuel Hill* made his will, and also a deed in the year 1759. By the will, which was duly executed, he gave several legacies, and when his estate should be disencumbered of the several charges, gave his estates to his trustees, to receive the rents during the life of his son, or until his (the son's) daughter, should attain her age or marriage, then to pay the rents to her, and to convey the estate to her for life, remainder to trustees to preserve contingent remainders, remainder to her first and other sons in tail male; remainder to her daughters in tail, and in default of such issue, to such person or persons, and for such uses as he should, by deed executed in the presence of two or more witnesses, appoint. The next day he executed a deed poll (in the presence of two witnesses) reciting the will, and, thereby, on failure of issue of *Betty Nuttall Hill*, directed

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directed that his trustees should convey his estates to the first son of the body of his son *Richard Hill*, by any wife, (except *Ann* daughter of *Edward Wylde*, or any other daughter of *Edward Wylde*), in tail, remainder to the second and other sons in tail, remainder to daughters in tail, remainder unto the right heirs of the survivor of his said trustees, his heirs and assigns for ever. *Stansfeld* the defendant, is the surviving trustee in the will and codicil; and Mrs. *Habergham* and *Wylde* conceive, that they are now entitled to the estate. *Betty Nuttall Hill* died in 1772, without issue; upon her decease, all the uses were gone except those under the deed poll. *Richard Hill* cohabited with *Ann Wylde*, (the person whose issue were precluded,) and had, by her, the plaintiff in the original cause, whom the jury have found illegitimate. The only question now is, between *Habergham* and *Wylde* against *Stansfeld*. *Stansfeld*, by his answer, sets up a claim, that the will vested the estates in the trustees; and insists, that the deed poll, though not part of the will, operates as a declaration of trust as to the freehold estates: with respect to the copyhold estates, he insists that the deed poll is a testamentary disposition, and claims under it, as surviving trustee in the will and codicil. On behalf of *Habergham* and *Wylde*, we contend that they are entitled as heirs at law.

[\*] 1st. With respect to the freehold: there can be no question that the deed poll, if it is to be considered as any thing, must be considered as a testamentary disposition. If he had given no farther uses than those contained in the will, they being spent, the estate must have gone to the heirs at law; but he has made a further disposition by the deed poll. Having by his will disposed of a part of his interest, in order to part with the rest, it must be by a testamentary act, and the deed poll must be part of the will; with respect to this, the objection is, that it is not executed agreeably to the statute of frauds. It is not in the nature of a power: if it was, the will not speaking till his death, there would be no time for the power to operate. But it is a direction to the trustees, to convey the estate according to an instrument not duly attested according to the statute: such a direction, if valid, would introduce every evil the statute was intended to prevent; but such an appointment is void, *Wagstaff v. Wagstaff*, 2 Wms. 258.: if it was not, a man might make a will duly attested, and only referring to any paper he might afterwards write, and by this means dispose of all his lands by a will not duly attested. If a codicil might have been incorporated into the will; yet the testator did not intend this deed should do so; he meant it to operate as a deed, not as a will. He left a blank in it for the ultimate remainder, which appears to have been filled up at a different time; and being a contingent remainder, there should have been a freehold to support it; which there is not, the uses being exhausted, and the trustees not being trustees to preserve contingent remainders, for they were to convey to trustees for that purpose. Besides, they are to convey to the heirs of the surviving trustee; and there being no person to convey to, the use must now be void, and must go to the heirs at law. Secondly, with respect to the copyholds: With respect to these, *Stansfeld* insists it is a testamentary disposition: yet he has not proved it as a will; without which it cannot be considered in this court as a will. In the case of *Carey v. Askew*, (ante, vol. ii. p. 58.) *Carey*, the testator, having a will by him, had given instructions for another will, which was drawn, and duplicates prepared, but the testator was dead before they were brought for execution; these having been proved, his Honor held, that whatever the ecclesiastical court received as a will, would [\*] pass copyhold estate: but that was expressly determined on the probate, without which, the instrument could not be received here as a will. In the present case, there is also a defect in the surrender, which is to the

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trustees, not to the lord, to the use of the will, and it is not upon stamps, which every surrender to persons by name must be, not being within the exception in the acts.

Mr. Madocks, Mr. Scott, Mr. Graham, and Mr. Stanley, for the defendants.

The purpose of the will is to declare the trusts of the estates; and if merely so, being only to pass an equity, it will be sufficient without being attested according to the statute of frauds; the right heir of the surviving trustee will take the freehold, and the court will carry the uses into execution, as far as it can consistently with the rules of law. For that purpose, if a bill had been brought for a conveyance, the court would have directed it to be in such manner as to protect the ultimate remainder; and, if necessary to support the heir's interest, would raise an estate for life in the last surviving trustee, in order that the heir might take by descent; as it has been in the case where a person has covenanted to stand seised for his heir at law, the law will raise an estate for life, in the covenantor, to protect the heir's title, *Pybus v. Miford*, 2 Lev. 79. The principal question in the present case divides itself into three inferior ones, 1st. whether the real estate is devised at all. 2dly. with respect to the copyholds. 3dly. as to the interest of *Stansfeld*, the surviving trustee. The first question arises upon the argument used on the other side, that the deed poll cannot be incorporated into the will, as not being of a testamentary nature; or if it was so, as not being attested according to the statute of frauds. To the former objection, it is a sufficient answer that this deed must be considered as the execution of a power legally reserved. A will, properly considered, is a conveyance; the statute giving the power of devising by will, has introduced into the law a new form of conveyance; this is the true reason why after-purchased lands will not pass by the will, *Cowp.* 90., because, to all intents and purposes, it operates from the time of making, as an inchoate conveyance, though consummated by the death of the [\*] party. There is no reason, therefore, why in this, as in any other form of conveyance, the grantor should not reserve to himself a power of revocation or appointment of new uses. It has been frequently determined that he may give such a power to a third person, as a power to sell, or a power to a third person to nominate, where the vendee or appointee will be in under the will. A will giving such a power has been held good under the statute; and the reason is, that the attestation is held to extend to all the subsequent uses. If the testator may make such a reservation to another, why should he not to himself? The reason given is, because he may make a new will: but this is no reason, for the attestation will extend to both acts. So where the attestation is to a subsequent act, referring to a prior act, the subsequent attestation will give validity to the former invalid act. There are many cases where a subsequent act affects those which are prior; as a covenant to stand seised to the use of a daughter on her marriage; though no use would arise until the marriage of the daughter, yet, if the covenantor executed a deed in the mean while affecting the reversion, when the marriage was had, the subsequent act would be affected. So where the deed was a bargain and sale not enrolled; the enrollment will affect intermediate acts. If the will be a conveyance, why in this case should not the testator limit such uses, by this way as well as any other conveyance? If the bargain and sale contained a power of revocation and of appointing new uses, the analogy between it and the present case would be complete, as there the enrollment would let in new uses. But it is not necessary to argue in this case from analogy: a great number of cases have determined, that the actual interests in the devised premises may pass by unattested acts, referred to by the attested will, or by codicils pointed or referred

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to by the will. In *Masters v. Masters*, 1 Wms. 421., it was determined, that a charge of legacies generally on the land would charge it with legacies given by an unattested codicil. So in *Brudenel v. Boughton*, 2 Atk. 268.; the same point is said to be settled in *Windham v. Chetwynd*, 1 Burrow, 423. In *Williams v. The Duke of Bolton* †, a trust term of 1000 years was given to trustees in trust, that they and the survivor, &c. of them should raise, levy, and pay the legacies before given, and all such legacies as he (the [\*] testator) should therein, or by any codicil give; his Honor held, that the legacies contained in the unattested codicil passed. In *Rea v. Hopper*, Rolls, 10th of March, 1785, there was a trust term for payment of legacies generally: the testator afterwards gave several legacies by unattested codicils, his Honor ordered them to be raised by virtue of the trust term. In all these cases, the substance, the value of the land, has been given by acts unattested; it would be strange to say its whole produce could be so disposed of, but not the land itself. The deed poll, within all these authorities, is a testamentary paper incorporating itself with the will. The testator gives his real estates, "subject to such charges, &c. as he by deed, &c. shall direct." If, by this deed, he had directed the trustees to convey the estate subject to a charge, the authorities would support us in contending such charge must take effect. The interpretation of this clause, in the statute, has been so liberal that there is scarce a word in it that has not been construed with the greatest indulgence in order to make the will good; as in the instances of executing in the presence of the witnesses, their attesting in that of the testator, the possibility of his seeing them, or their seeing him, their attesting at the same time; in every instance, the greatest laxity of construction has taken place to support the acts. So with respect to the effect of codicils to republish a will of real estate; as in a case where there were three wills, the third will being republished by a codicil, republished the first will as to the after-purchased lands. So where there has been only one will, a codicil not referring to it, will republish it. In the late case of *Rankin v. Mellish*, the Court held this still more favourably; for the codicil not referring to either, it entered into the question, whether it meant to refer to the will of 1780 or of 1774, the codicil itself being made in 1782. The cases relied upon to show that there must be a reference to the will, in the codicil, in order to amount to a republication of it, are 2 Eq. Abr. 768. Cowp. 158.; but as to this point of republication by a codicil, there is a passage used in argument, 1 Vesey, 487., in the case of *Gibson v. Lord Montford*, which shows, that the counsel argued it as a clear case, "notwithstanding the " statute of frauds, a will may be made, properly attested, giving real " estate to such uses as contained in such a settlement, though that settlement is not attested by three witnesses, and it would pass [\*] new " purchased lands; for sufficient certainty by referring to something " certain." This furnishes a ground of argument in support of this case; for the settlement being previous to the will, or subsequent, cannot rationally make a difference.

There is a case where a testator gave lands by will duly executed, to raise a certain sum to be paid to a person to be named in a paper: no paper being found, it was held, the charge must sink for the benefit of the heir; but it was taken for granted that, if any paper had been found, the sum would have passed to the person named in it. Where the attested paper refers to the unattested one, the legacy passes by the attested one. In *Wagstaff v. Wagstaff*, the Court seems to have been of opinion, that the will ought to have referred to the power. If it be true, that a person, by a codicil attested by three witnesses, may repub-

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lish a will those witnesses never saw, or, by will attested, may refer to a paper unattested, he may refer to any paper generally, which he may at any subsequent time sign, and the devise shall be good to the uses declared by such paper.

2dly. The next point respects the copyholds; we are to maintain, that the will and deed poll are sufficient to pass them to the uses of the will. The first objection that has been taken to the deed poll passing the copyhold estates, is, that it cannot be a testamentary act, because not proved in the Ecclesiastical Court; but the probate is not necessary, in order to pass the copyhold. A will of copyholds is proved here like a will of other lands; and although in the case alluded to of *Carey and Askew*, the probate was read, it was only to save the time of the Court, as evidence was ready to prove it *per testes*. But it is said, we cannot read the surrender, because it is not stamped. This is a surrender to the use of the will, and agreeable to the usual form in many manors: it is clearly within the exception in the stamp laws, the words of which are, "other than a surrender to the use of a will," therefore it will be a good surrender, without being stamped; but if this were not so, it might yet be stamped, so that at most this formal objection would only put us to the delay and expense of having the instrument stamped. Then as to the deed poll not being attested by three witnesses; if it is, as we have argued, incorporated into the will, the attestation [\*] extends to it, and it is executed within the statute of frauds. But supposing the Court not to be of that opinion, still the deed poll is sufficient to pass the copyhold estates: copyholds are not affected by the statute of frauds; they stand in the light of personal estate: and any will which is sufficient to pass the latter, will direct the uses of the surrender to the use of the will: this point was determined in *Carcy v. Askew*. But, in the present case, this is a contingent remainder of the copyhold, to the right heir of the surviving trustee. The freehold in the lord is sufficient to support this contingent remainder. 2 Roll. Abr. 794. pl. 6., Sty. 249. 273., S. P. Roll Rep. 438., *Lane v. Pannel*, *Mildmay v. Hungerford*, 2 Vern. 243. In the first of these cases, there was an estate for life, in the ancestor, remainder to the heir of his body; it was held the contingent remainder was not in the power of the ancestor; and the reason is given in the case in Vernon, because the freehold in the lord supported the remainder. Mr. Fearne, on *Contingent Remainders*, 244., (470, 4th edition) states it as clear law, that the destruction of the particular estate in a copyhold will not defeat the contingent remainder, and puts a case to that purpose in page 238., (458, 4th edition.)

3dly. The third point is with respect to the validity of the devise of the freehold. It divides itself into two questions, 1st. whether the limitation to the right heir of the trustee has become void by the particular estates which should support it being gone: in that case the defendant can have no ground: but if the limitation may still take effect, it will confine the plaintiff's claim to the intermediate rents. Here we contend, that the limitation to the right heir as a purchaser, is good, and that the ancestor, having the trust, is a trustee to preserve the contingent remainder. If a conveyance had been called for, before the determination of the particular estate, the question would have been, whether the Court of Equity should not so mould the limitations, that that to the right heir of the survivor should be preserved, although the trustee should survive the particular estate. It would be difficult to contend that the testator intended his own right heir should take the estate, in case the surviving trustee should survive the particular estate: his most probable intent was, that the trustee should take the estate beneficially: but, at all events, he meant that his heir should take it. The Court would not have ordered such a [\*] conveyance as would defeat

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defeat the use; they would have interposed an estate to trustees, during the life of the surviving trustee, in trust to preserve the contingent remainder; the form of the limitation would probably have been, to a trustee, during the life of the surviving trustee, to the use of the heir of the testator, and from and after the death of the surviving trustee, to the use of the right heir of such surviving trustee. We do not intend to admit, by this argument, that he did not mean to give it to the surviving trustee himself beneficially. The legal estate vested in him absolutely; and the intent appears at least, as probable that he intended him the equitable interest also, as that he meant otherwise. The will is capable of the construction that it was meant as a contingent remainder to the surviving trustee. If he did not mean it so, the intermediate estate, after the expiration of the trust, would descend upon the heir in the mean while, which will be sufficient to support the contingent remainder; but in the present case, the estate in the trustees continued to support all the uses. There was no time when a conveyance could be called for, till the death of the surviving trustee. If so, the case is like those of *Hopkins v. Hopkins*, Forrest. 44., and *Chapman v. Blisset*, Forrest. 145., which goes the whole length of proving that, if the estate in the trustees did not support the contingent remainder, the estate descended to the heir would support it.

Mr. Mansfield, in reply, on the part of the heirs at law.

The material question is, whether the *real estate* passed by the *deed poll*. This instrument has been called an *execution* of a power: but I deny it to be so, it is a codicil to a will, according to the definition of a codicil, being something added to the will, either diminishing or enlarging the bequests of that will. The equitable interest, had this deed not been executed, would have descended to the heir at law, the will and the deed poll having no operation till the death of the testator.

There is no case in which a testamentary disposition, either as an execution of a power or otherwise, has been held to pass real estate, where it has not been attested by three witnesses. As to Mr. Graham's argument, in analogy to the cases of bargains and sale and execution by enrollment, &c. it does [\*] not apply; Mr. Graham has said, a will is a conveyance which may give a power to a third person. A will gives an estate to *A. B. &c.* to such trusts, intents and purposes as he shall declare; when the party dies, all his estate passes, subject to a particular power, which the testator exercised over it. In *Adlington v. Cann*, 3 Atk. 141., it is expressly held that no deed can operate as a testamentary disposition, without being attested by three witnesses. If it was not to be so, the statute would be a mere nullity. In the present case, the testator having it in contemplation to make a disposition of his real property, refers to a deed or writing to be executed by him and attested by two witnesses. If such an attestation as this was to be allowed according to Mr. Graham's argument, any scrap of paper so executed would have done: if the attestation is not necessary to the subsequent instrument, the time of executing such a deed is immaterial; and as to its being a partial disposition, that will make no difference, whether it be of a part, or of the whole: and if the testator gives the legal estate to *A. B.*, for such trusts as he shall after declare, he may do so of the whole, as well as a part, whether it be legal or equitable estate: he may then dispose of it by the loosest scrap of paper without reference to the will, which would be completely defeating the intention of the statute of Frauds.

The case has been considered in the nature of a republication of the will, or that both instruments may be incorporated so as to pass the lands; but no case or *dictum* of the Court has been cited in support of such arguments: a case indeed from Cowper, 158., and mentioned also

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in Douglas, has been cited, where the codicil referring to the will did pass the lands; but there, the attestation was complete, and therefore the case is not to the purpose. In the present case, the witnesses attesting the will knew nothing of the deed poll or its contents, and therefore it cannot square with that case.

Lord Chancellor. — Do you refer to the will being executed by three witnesses, as in the case of a reference to a marriage settlement?

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Mr. Mansfield. — In the present case, nothing passes by the deed referred to: so in the case of marriage settlement, nothing passes [\*] by the settlement, it is merely referred to, as a deed of description.

The deed poll is an instrument disposing of what the will did not dispose of; and, therefore, being executed only by two witnesses, its referring to the will is, in fact, referring to nothing; and not like the case of a codicil referring to a preceding will, where something is already given; for here nothing is disposed of, and it amounts to nothing more, than an expression of a future intention to do something beyond what the testator has done in his will.

Lord Chancellor. — The instrument of itself is a nullity, unless the will makes it something; and the question is, whether the will makes it any thing?

Mr. Mansfield. — As to the authorities *Hyde and Hyde*, 3 Chancery Rep. 155. is a strange decision.

As to *Brudenell and Boughton*, and *Masters and Masters*, a distinction is taken, from a devise of the interest in the will; it could not extend to the legacies in the codicil; as to *Williams v. Duke of Bolton*, Lord Camden found great difficulty in coming into the doctrine of former cases and opinions upon that subject. But this case differs from any of those.

There is no case against us; and, if the statute of Frauds is to have effect, the freehold estate clearly did not pass by the will, and, if so, we get rid of the limitations.

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With respect to the copyhold estate. Copyhold estates are out of statute of Frauds; and therefore are exactly in the same situation as before that statute, except as to this circumstance, that the will must be in writing; the law is the same as in *Henry the Eighth's* time; if decided to be a good will in the spiritual court, and there proved as such, it will pass the copyhold estates, though such a will will not pass realty, so determined in *Carey v. Askew*; there it was held a good disposition of the copyhold estate, though the will merely consisted of instructions drawn up by the attorney, and the testator died before he could execute his will; but it was determined, as [\*] the ecclesiastical court had received it as a will, it passed the copyhold estate. A customary will is a customary instrument, and may be proved in the lords' court, (where the custom warrants it,) as an instrument relative to the custom. In *Comyns's Digest*, title Copyhold, it is said the custom of the manor may regulate any particular instrument by which the property is disposed of. As to the effect of these limitations, if they are valid so as to secure the estate to the right heirs of *Stansfeld*, they are good in various ways; but I contend, that they cannot be so in any one way. Mr. *Madocks* has endeavoured to support them by an implication of an estate for life to *Stansfeld*, supposing it to be to the right heir of him, not to himself; but there is no colour for raising such an estate by implication; and the case of *Pybus v. Mitford*, so much relied upon by Mr. *Madocks*, has no relation to this case. The next attempt was, an interposition of a peculiar limitation to trustees, to support the contingent remainders so long as the trustee shall live, but there is no ground for such a limitation; particularly in a case like the present, where a court of equity is, as much as possible, to favour the heir at law. The estate is given to nobody.

nobody, but left merely at random: the cases of *Chapman v. Blisset*, and *Hopkins v. Hopkins*, have been resorted to, but are perfectly distinguishable from the present.

Lord Chancellor.—The mode of supporting these limitations, must be by converting the contingent remainders into an executory devise.

Mr. Mansfield.—I take it, the doctrine of those cases differs from this; for that, in those authorities, the testator has declared, by his will, the uses; here he has not, but only given it to trustees for such purposes as he shall appoint by a subsequent deed poll: he has expressed, by that deed poll, what the conveyance shall be “to the first son, &c.,” very proper words for the conveyance; and there can be no other than a strict settlement, pursuant to the directions of the testator, by this deed-poll. Mr. *Graham* has relied merely on the words “a good and sufficient conveyance in the law;” but those are the usual words, and amount to nothing. He has drawn an analogy between this and the case of marriage settlements; but they are perfectly distinct, for there the settlement has a reference to a preceding contract. [\*] *Glenorchy v. Bosville*, proceeds upon the idea of the contract operating as a bargain for a valuable consideration. As to the copyhold estate being in the lord, it is said where the conveyance is to *A.* for life, with remainder over, such conveyance operates by the consent of the lord, as in cases of realty where there are trustees to preserve, &c., so that in cases of forfeiture the estate for life goes to the lord.

Lord Chancellor.—It is impossible for me to give the directions in respect of the conveyance: it must previously go to the Master for an account of the testator's debts and legacies, &c., and of the several charges made by the will, and of the rents and profits of the estates received by the trustees under the will; and upon the result of that account, a direction must be given, whether the estates are to be sold or mortgaged; and if it should appear that there is a balance upon that account, then, after the sale or mortgage of part of the estates, a further direction must be given respecting the conveyance. I am glad the argument has gone so far: however, it is reduced to two points only; as to the first point, I see no inconsistency in drawing the analogy between this and other cases which have admitted charges by a subsequent codicil, to take effect upon the estates, devised by the will. Why should not a trust take effect in a like manner, by a subsequent deed, as connected with that will? It would be strange that the one should take effect, and the other not. Such a trust may be considered in the nature of a charge or annuity, or rent charge, or any other interest; and it is the same thing as if the estate was given out and out, and disposed of by the deed-poll, as a declaration of trust in reference to the will: it is not a disposition *de novo*; for, without a reference to the will, it could not be maintained.

Then the next question is, whether this conveyance ought to provide for a contingent interest to arise within a life or lives of a person in being, or nine months afterwards. What would the case be, if there was no conveyance, but the estate merely given to trustees? It is difficult to distinguish it from *Hopkins v. Hopkins* and the other cases alluded to, in which contingent remainders vest in estates tail that arise after the next remainder comes into *esse*; and yet the estate in trust for, or rather to the use of the heir at law, awaits until the contingent remainders [\*] come into *esse*, and then is executed, not in the shape of a contingent remainder, but of an executory devise mounted upon an estate in fee.

Then the question will be, whether the circumstance of the testator's having directed the conveyance to be made, will make a difference; had it been made while the remainders were in contingency and not ex-

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tinguished, it must have been made so as to exclude an estate in the trustees, capable of supporting such an executory devise; and I know no difference between such a contingent remainder and an executory devise; both of them are springing uses.

The accounts having been taken, the cause came on again, upon further directions, 10th and 26th of February, 1790, and was argued by Mr. Mansfield, Mr. Selwyn, and Mr. Johnson for the plaintiff, Mr. Solicitor General (Scott), Mr. Graham, and Mr. Stanley for the defendants; but the argument being much to the same purport as the above, it is not necessary to repeat it.

And (on the 31st of January, 1792,) Lord Chancellor Thurlow gave his judgment to the following effect. (5)

Lord Chancellor.—

The principal point of difficulty, or at least the previous one, is, whether the deed of the 6th of October carries any uses in the land. Here is, first, a will attested by three witnesses, which limits certain estates to trustees, in strict limitation, and concludes with such trusts as the testator should, by any deed, appoint. The last trust is a fee-simple to the trustees, devised to certain uses. It has been argued, that the original will has not raised any estate. The rule is that, where there is a devise in trust for the payment of debts and legacies, it is sufficient to operate as a charge on the estate so devised; this arises from the generality of the words, *debts and legacies*; and it is now settled that, whether they exist or not at the time of the devise, if they are given by such a will as the ecclesiastical court would establish, it is sufficient to create a charge. There are cases, in which it has been asserted, that if a man charges an estate with a sum of money, and reserves to himself the right of disposing of that [\*] money, he may dispose of it without the presence of three witnesses; this has been so argued, but I do not know that it has ever been decided; the only case I can find of the effect of the operation of a deed upon a will is, the case of *Metham v. Duke of Devon*, 1 Wms. 530.†, indeed, it is to be observed, that that was a case of personal estate; if the report is correct, these observations arise, that, if the will depended upon the deed, and was considered as part of it, it was a decree of peculiarity, because the will, at the time of the execution of the deed, was nothing, and it was supposed to operate, as a deed; the Court, in giving their opinion in that case, meant to establish this principle, that the will, though it did not operate so as to move the interest of the testator in the subject devised, yet was sufficient to give to the subsequent deed that effect, which it would not have otherwise done: but that is a distinct case, being a bequest of personalty, and the deed might have been proved as a testamentary disposition. There are a number of cases, where the Court has directed such a paper to be proved as a testamentary schedule; at any rate, that case falls short of this; that was a case of personalty, and cannot be said to govern this, which arises upon a deed attested by two witnesses for disposing of realty. This is a new question, and if authoritatively decided, must decide in all other cases in law and equity upon wills. I have an opinion upon the subject, but as it is a new case, it would be too much for me to decide without the assistance and opinion of a court of law. Therefore I shall direct a case stating a devise to trustees with the uses like the limitations here, &c., to see whether the deed is sufficient to lead the uses. If the estate is deemed to pass, a question will arise, whether an estate devised to two trustees, then to

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† See the case from the Register's book in Mr. Cox's note.

(5) See the report on this occasion, 1 Ves. jun. 410.

the survivor and his heirs, makes a jointenancy in fee-simple; let the case be made, and the consideration of that question reserved.

A case was accordingly made, and sent to the Court of King's Bench. (6) The questions were, 1st. whether the two instruments, taken together, were, at the time of the death of the deviser, sufficient to pass any estate or interest in the freehold or copyhold premises, or either of them, not given by the first instrument? 2dly. whether, upon the death of *Richard Hill*, any and what estate or interest in the freehold and copyhold premises, [\*] or either of them, passed by virtue of the said two instruments to the said *George Stansfeld*, and will, at his death, pass to such person as shall then be his right heir?

The case was argued twice, (a summary of which argument may be found in 5 Term Rep. 92.) and the judges (*Lord Kenyon*, *Buller*, and *Grose*) certified, in answer to the first question, "that the two instruments, taken together, at the time of the death of the testator, were not sufficient to pass any estate or interest in the freehold or copyhold premises, or either of them, not given by the first instrument;" and with respect to the second, that, "upon the death of *Richard Hill*, no estate or interest in the freehold and copyhold premises, or either of them, passed by virtue of the said two instruments to the said *George Stansfeld*, or will, at his death, pass to such person as shall then be his heir."

The cause came on, upon the equity reserved, on the 1st of *June*, before the present Lord Chancellor. In the meanwhile the deed-poll had been proved as a will in the ecclesiastical court.

Lord Chancellor said he wished to be assisted by judges.

The cause stood over till the 15th of *June*, when it came on before Lord Chancellor, assisted by Mr. Justice *Buller* and Mr. Justice *Wilson*.

Mr. *Mansfield*, Mr. *Selwyn*, and Mr. *Johnson* for the plaintiff heirs at law of the testator.

*Stansfeld*, the surviving trustee, does not know whether to claim for himself or his heir at law: a difference has been taken between the copyhold and the freehold estate: we argue, that the heirs at law are entitled to both, and that no interest passed either under the will or the deed.

Considered as a will, it is impossible it should pass any interest.

The interest passed by the will was at an end, by *Betty Nuttall Hill* dying without issue.

[\*] The deed takes up a new set of limitations, not to take place till the failure of issue of *Betty Nuttall Hill*: but a man cannot found a new set of limitations on a general failure of issue, so that the deed must be void.

It is not necessary for an heir at law to shew that the testator meant the estate to come to him; it is sufficient that it is not clearly given from him. (7)

The argument in the King's Bench was upon the ground that the two instruments could be united, and that they made one testamentary act. But it is to be treated as a deed; it is executed as, it is called such, it is called so by the testator.

The testator blundered; but his mistake will turn out for the benefit of the heir at law. He thought he had reserved a power to himself to limit a different estate from what he had given by the will: nothing

(6) See 1 Ves. jun. 410, 411, 412.

(7) Unless the estate intended to be given is clear, and the person is clear, it ought to go to the heir at law: therefore, if there is a doubt whether a trustee or the heir should take, it must go to the heir at law. *Pugh v. Goodtitle*, in the House of Lords.—From Mr. Bell's MS. notes.

could

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could be more absurd than this idea: he could not, by his will, give himself any new power, for he continued absolute owner of the estate; nothing therefore could pass. It could have no effect during his life. (8) Where there are limitations of an estate by one deed, and further limitations by another deed, they cannot be coupled together. *Moore v. Parker*, 1 Lord Raym. 37. *Goodman v. Goodwright*, 2 Burr. 873. *Doe on dem. of Fonnereau v. Fonnereau*, Dougl. 487. The Court of King's Bench, on the authority of these cases, held, that they could not unite the deed with the will. If this is a clear established point, then the question will be, whether there is any distinction between this case and those; that is, whether it makes any difference that the deed is after or before the will. In those cases the deed was prior; but it will be strange to determine that, where the deed is prior to the will, it is void; but good, if it is after. We shall leave it to the other side to shew how this deed can operate as a will, or how it can have a testamentary nature.

But supposing this question to be taken against us, it will be necessary to consider the effect of the deed; 1st. as to the freehold; 2dly. as to the copyhold estate.

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As to the freehold, it is sufficient to object that it is attested only by two witnesses. It is the direct position of the statute of [\*] Frauds that three witnesses are necessary to every deed to affect lands. What would be the effect here? To dispose of the reversionary interest remaining in himself. Can such an interest be disposed of by an instrument attested by two witnesses? As to its operating as the execution of a power—it cannot operate as such where he had the whole estate in him. It is not a declaration of trust; if it was, it would dispose of an equity: but it cannot be a declaration of trust, for the same reason that it cannot be an execution of a power. It can have no additional effect from being a deed, than if it was a simple paper: a testamentary act requires no force from being by deed: there is no difference in disposing of an equitable or legal interest.

As to the authorities (if they deserve to be so called) respecting the republication of a will by a codicil, they argue, that a will attested by three witnesses, referring to another act, will adopt that instrument. That a codicil does so, is on the ground that the will is incorporated by the codicil; but a future act cannot be incorporated. The case of *Brudenel v. Boughton* was very much doubted by Lord Camden. That legacies given after have been held to be within a charge, proceeds in analogy to a charge of debts, which will include after-contracted debts; but will it be argued, that by any such analogy the whole beneficial interest will pass by such a paper? (9)

Then with respect to the copyhold estate: to operate on that, it must be a testamentary act; and, that it may have that operation, they have proved it as a will: but this is the only resemblance it has to a will, for it disposes of no personal estate, it appoints no executor, it purports to be an execution of a power. Then the copyholds are surrendered to the use of a will: considering that surrender as good, there must be a will to execute it; then it is impossible it should pass by this instrument; it would not, even if it had been attested by three witnesses.

Then the reversion is given to the heir of the surviving trustee: he

(8) This is called a deed poll, and stamped as a deed poll: if it is a deed poll the Court of King's Bench has already determined it in favor of the heir at law.—From Mr. Bell's MS. notes.

(9) The other cases mentioned and commented upon, were *Masters v. Masters*, 1 P. W. 21., Lord *Inchiquin v. French*, Amb. 53.—From Mr. Bell's MS. notes.

is still alive, the contingent remainder must be bad, for want of a particular estate to support it. (10)

But it is said this will not apply to the copyhold, on account of the lord's estate: but the case of *Lane v. Pannel*, Roll Rep. 438. [\*] shews it will not support a contingent remainder where the former uses are expired. Here the prior estates are all gone, and the remainder is to the heir at law of the surviving trustee, not to the surviving trustee himself.

It is impossible to make it a limitation to the trustee himself; it is only necessary to read the limitation to prove this; to make it a limitation to the surviving trustee himself, the words "right heirs" must be omitted; but the law never adopts this rule, but gives effect to all the words.

The legal estate of the surviving trustee and the equitable estate of the heir could never unite, but that will be the case; they both come to the same person; and that will happen which did in the *Selby* cause (*Goodright v. Wells*, Dougl. 771.) that the legal and equitable estate centering in one person, the trust is at an end, and it must follow the nature of the legal estate. In *Pugh v. Goodtitle*, in the House of Lords, (15th May 1787) the devise was to "the right heir of me *Calvert Benn*, my son excepted:" It was argued that he meant the person who would be his right heir, if his son was dead; but it was decided, that it went to the son as right heir.

Mr. Attorney General, Mr. Graham, and Mr. Stanley, for the defendants.

The question before Lord *Thurlow* was purely an equitable question: the legal estate both in the freehold and copyhold, is in *Stansfeld*; then the question is, whether the heir at law has any equity to call on *Stansfeld* to give him the legal estate in either. Lord *Thurlow* did not, when he sent the case to a court of law, want their assistance to tell him that the case of *Fonnerneau v. Fonnerneau*, was established; but, in that case, if the deed had been subsequent to the will, it would have passed the beneficial interest. This is clear, that, if I by a settlement attested by two witnesses, create uses, and by will referring to it, I appoint different estates, the reference in the will makes the settlement part of the will; and if by a will a man can refer to a former deed, why should he not refer to a future deed, *Metham v. the Duke of Devon* shews the will and the deed may be united.

[\*] The deed poll, though called a deed, operates as a will: Mr. *Mansfield* never before represented it as a deed. It never was treated here as a deed, but as a testamentary act. It must be testamentary; because it was to have no operation during the life of the testator: whether it is a will or a deed, *Stansfeld* is entitled: but we argue it as making part of the will. We certainly did contend that the freehold and copyhold, now vested in *Stansfeld* beneficially: the intention was that his right heir should take; and if the Court had been applied to, recently after the death of the testator, it would have so moulded the limitations as to have effected the intention; then the same thing shall be done, though there has been no application till now: here the general view of the will was to give the trustees a joint estate, with a remainder to the survivors; as in *Vick v. Edwards*, 3 Wms. 371.

(10) For the rule is, that the remainder must commence when the preceding estate determines; and this is true in trust estates as well as in legal estates. Executory devises are only a modern invention, and not favoured. Salk. 226. Trustees cannot have a greater estate than is given by the express words of the will unless it is clearly necessary from the words of the will. There is no instance of a trustee being inserted to preserve contingent remainders after the estate had resulted to the heir. — From Mr. Bell's MS. notes.

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It is demonstrably clear, that if a man makes no other will than this, "I charge my land with my debts," and executes it in the presence of three witnesses, he may, by bond or note, dispose of the whole value. So where the charge is of legacies, he may give rent charges by an unattested codicil; as was determined in the case of *Williams v. The Duke of Bolton*.

By the law of Scotland, a man may make a deed in the presence of three witnesses, giving himself a faculty to dispose by an act attested by two witnesses.

A man may make a settlement by which he gives a power to a third person, to dispose of his estate by act unattested. So he may enable his wife to pass it, though a feme covert, and the will only having two witnesses. So if a woman, before marriage, reserves such a power, her will will be good, though when she makes it she has no legal capacity, and the will executed in the presence of only two witnesses; as appears in *Wagstaff v. Wagstaff*, and *Longford v. Eyre*, 1 Wms. 740. If you direct, by the instrument giving the power, how it is to be executed, you may vary the method pointed out by the statute of Frauds, and under such power, a man, by a bond, mortgage, or even by a simple contract debt of a sufficiently large sum, may dispose of the whole value of the estate; and though the case has not been determined in specie, the whole estate may be bound by the charge.

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[\*] It appears by the case of *Addlington v. Cann*, 3 Atk. 141. that there must be a reference in the will, to the unexecuted paper to make it effectual; but here is a distinct reference in the will to the act called a deed, and the deed recites the will.

The statute requires the attestation of three witnesses to the sanity of the testator, at the time of making the will, and where the subsequent act is attested by three witnesses, you have their attestation to the adoption of the unexecuted paper.

As to the case of codicils republishing wills, the maker of the will could only mean to dispose of estates which he then had; yet the codicil will pass after-acquired lands.

The next point is, that as a testamentary paper, it will not pass freehold lands for want of an attestation by three witnesses; still it will dispose of the copyhold estates. There is no reason why a will of copyhold should be attested at all; for it has been held that such a will as the Ecclesiastical Court will consider as sufficient to pass personality, will be a good will of copyhold; for in the case of copyholds, the will is only the limitation of the use; the surrender is the act that passes the estate, *Carey v. Askew*, (*ante*, vol. ii. p. 58.) As to the will being proved, Lord Thurlow shewed his opinion that it was not necessary by sending the case to the Court of King's Bench, without having the will proved. (11)

The next question is, whether this instrument is to be considered as a will or a deed. In reason and principle the instrument is testamentary; as it is to operate upon the death of the party. It comes within the definition of a devise, "a declaration of the mind to take place on the death of the testator." Carth. 38. It may be in the form either of a deed or a will. If in the form of a letter, that would be sufficient, [*West's case*,] Moore, 177; so it may be in the form of an indenture, *Dyer*, 166. 2 Leon. 159; by articles of agreement *Greene v. Proude*,

(11) "The Attorney General here observed, that the Courts acted erroneously when they admitted probates as evidence of the disposal of copyholds." — From Mr. Bell's MS. notes.

1 Mod. 117. 3 Keble 310. (12) In *Scotland* devises have generally the form of deeds; and a *Scotchman* having personalty in *England*, a deed was proved as a will, in a case of *Hog v. Lashley*, in the House of Lords (7th May 1792.) (13)

[\*] Then, this operates as a devise to *Stansfeld* himself; if not, there is no equity in the plaintiff to call for it: there is no resulting trust to the heir during *Stansfeld's* life; the testator did not mean to give the heir any such equity. If not so, a conveyance might have been called for; and it must have been such as to have vested the estate in *Stansfeld* himself, or at least to have preserved the remainder for the heir of *Stansfeld*. The general estate in the trustees will support the contingent remainder, *Harrison v. Naylor*, (ante, vol. iii. p. 108.) *Gale v. Gale*, in the Exchequer, where there was a gift, at twenty-five; trustees were interposed till the son attained twenty-one. (14)

With respect to the copyholds, *Lane v. Pannel*, admits the rule that the freehold in the lord will support the contingent remainder, but lays it down that it will not do so where the prior uses are gone by efflux of time. That rule does not apply to cases where conveyances are to be made, and the legal estate is given to the surviving trustee.

The only question here, is, whether he can be called upon for a conveyance that will give the estate away from his heir. If this is a contingent remainder, the legal estate in the trustee will preserve it; and the direction for the conveyance should be like that in *Harrison v. Naylor*; it was immaterial whether *Stansfeld* survived alone, or more, as the conveyance would have been to the surviving trustees for life, to preserve the contingent remainder to the heir at law of which-ever should be the survivor. In *Baskerville v. Baskerville*, 2 Atk. 279. there being no trustees in the will, the Court ordered trustees to be interposed. *Hopkins v. Hopkins*, For. 44. *Chapman v. Basset*, *ibid.* 145.

Mr. Mansfield in reply.

Mr. Attorney General contends, that, whether the deed could or could not unite with the will, the heir at law could have no claim; but even if a man says, "I do not intend my heir to take any thing," † that will not exclude him, unless it is given away. Is not this a plain case of an estate given away for particular purposes, with a resulting trust, like the case of the Bishop of *Cloyne v. Young*, 2 Vern. 92. as to personalty, where the residue not being disposed of, resulted to the next of kin?

[\*] Here, the first gift is by the will, the new set of limitations by the deed, and it is impossible to unite the two instruments.

Where an appointment by deed is to such uses as the grantor shall declare by a future act, the whole passes by the deed; but does it follow, that where he makes a will, that does not operate upon the estate? If he refers to a deed, that such deed shall dispose of the estate? If a will refers to a prior deed, it is the same as if it recited it.

As to the cases cited where deeds have been taken as wills, they had all parts in them not reconcileable with their being taken as deeds.

† There were words to this effect in *Pugh v. Goodtitle*, cited ante, p. 375.

(12) "*Witham v. Dixon*, 1 Ch. Ca. 248. S. C. Finch, 195., were cited by the Attorney General." — Mr. Bell's MS. note.

(13) 6 Bro. P. C. 577., 8vo. edition.

(14) "*Bagshaw v. Spencer*, 1 Ves. 142., and 3 Atk. 570. 577., was also cited by the Attorney General." — From Mr. Bell's MS. note.

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The next thing is, how far this can operate on the copyhold. If the surrender is to the use of the will, the deed cannot operate as a will.

The only ground on which the limitation to the heir of *Stansfeld* can be supported, is that, if a conveyance had been made, there must have been trustees inserted to preserve the contingent remainder; that goes on the trusts being executory; but if these trusts are executory, there can be no such things as trusts executed.

The case of *Harrison v. Naylor* answers itself in this respect, for it is the case of an executory trust; and it would have been a strange thing there, to have laid out the money so as to have defeated the limitations. As to *Baskerville v. Baskerville*, I never knew trustees interposed, except during the life of the first taker. That would not have done here; two trustees survived *Betty Nuttall Hill*. (15) The cases of *Hopkins v. Hopkins*, and *Chapman v. Blisset*, are cases where nothing had been done to defeat the contingent remainders; and the estates continuing in trustees till the contingent remainders came into existence, the remainders ought to be supported by the estate of the trustees.

Here, all the trusts are gone. It is impossible to give the estate to *Stansfeld* himself.

On the 4th of July, the Lord Chancellor and Judges gave their opinions *seriatim*, to the following effect.

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[\*] Mr. Justice Wilson.—Stated the will and deed poll and proceeded.

The testator died soon after, leaving all the trustees, his son, and grand-daughter surviving him: the grand-daughter married, but there was no conveyance made of the estate at the time of her marriage; several of the trustees were then living; she died soon after her marriage; and, at the time of her death, two of the trustees were living; her father survived her many years; when he died, there was only one trustee left, the present defendant *Stansfeld*.

Several questions have been made. One by the trustee himself, upon his own behalf, as between him and the heir at law of *Samuel Hill*. Another respecting the freehold and copyhold, upon the behalf of the heir at law of the surviving trustee as against the heir at law of *Samuel Hill*. Each claims the whole. The trustee contends, that, if the latter deed cannot be considered as *testamentary or connected* with the will, but merely as an instrument to take effect by delivery, yet still, under the will itself, he is entitled to the *beneficial interest*, and that *there is no resulting trust for the heir at law*. As to that point, the facts are these, the estate is given to five persons, in trust for the payment of debts, which might last for ever; and, therefore, the trustee says, under such a devise as this, the whole estate is affected, and nothing passes to the heir: but he has given nothing more than the legal estate to these trustees, and the equitable one remains undisposed of, except for certain purposes mentioned in the will. It must lie upon the trustee, to show that the *equitable interest* is also disposed of by some express words in the will: as it is *otherwise* competent for the heir to say this is not given to any one else; because the *legal* estate being expressly devised to the trustees, it is incumbent upon the party to show that the equitable interest is also disposed of, and his claim against the heir must rest under the will of the testator; on the other hand, it is not necessary for the heir to show that it was meant for him, for, if it does not appear to be given to any one else, it must go to him. It has been argued, that a part of

(15) "As to *Bagshaw v. Spencer* there were trustees, and it was an equitable estate, "over which Lord Hardwicke thought he had more power than over a legal estate. "*Baskerville v. Baskerville* was an executory trust, to be executed by this court."—From Mr. Bell's MS. note.

the equitable interest *was expressly* given to the heir at law, namely the 50*l.* and the 100*l.* a-year; and that circumstance was much relied upon as a mark of the intention of the testator to give the heir nothing *more*; but whether so or not, is now perfectly immaterial, as the [\*] testator has not devised *away the equitable estate to any body else*. Supposing his intention was such, it could not avail; without an express devise of the remaining equitable interest from the heir, he must take it. So laid down in 2 Vern. (644 †) a stronger case than the present; it was held a resulting trust for the heir at law; the estate was devised to the trustees and their heirs, to *the use of them and their heirs*, upon trusts specifically mentioned. It was contended, that the devise being to them and their heirs, and to the *use of them and their heirs*, it was clearly meant, that when the trusts were answered, the remainder of the estate was to go to them, and there could not be a resulting trust for the heir at law; but the Chancellor decided, that it was not the intention of the testator to do so, and that he meant to leave them merely as *trustees*; and decreed the remainder to the heir. Hence I conclude upon the first question, that if the instrument of the 6th of *October*, 1759, had not been made, or, when made, could not have had any operation, there would, in that case be a resulting trust for the heir at law, and the trustee takes nothing. But supposing that to be so, it is then contended, upon the part of the surviving trustee, that this latter instrument, though called by the testator a *deed poll*, and stands as such, and the terms of the deed style it so, yet, with respect to his claim, it must be considered as a *testamentary instrument*, to be connected with the will, and that *both together* make one testamentary disposition of the estates. Upon the best consideration I am inclined to think that this instrument may be so considered: for when the testator made his will, he disposed of his estates upon certain trusts, and, at the same time, proposed to make a further disposition of them. It is true, that he falsely *conceived* that he could reserve to himself by his will, a power of limiting further uses by a deed attested by two witnesses only, but he does not say that he will do so by deed only, but adds, “by any instrument in writing;” and therefore both at the time of making his will, and afterwards at the period when he executed this instrument, his intention was to complete the disposition of his real estate. When he made his will, he did it only *in part*, and therefore expresses his intention to complete it; but he *does so by a declaration of uses*, when no *part of the estate is parted with by him*. It is a general principle, that where a man has expressed a clear and manifest [\*] intention to dispose of his estate, and he mistakes the mode of so doing, yet, if the instrument can be considered, as valid, in point of substance, so as to effectuate the intent of the party, its informality shall be overlooked, and the deed take effect, if by law it can: as where a man makes a feoffment to his relation and his heirs, and he neglects to make livery of seisin, it is obvious that he meant his relation should take it by a common conveyance, but he cannot do so for want of that formality, and therefore it shall operate as a covenant to stand seised, and the estate passes by the statute of Uses, and not by the common law; so as to support the intention of the party, *ut res magis valeat quam pereat*. This instrument, though called a deed by the testator, yet, as it was executed for the purpose of completing certain dispositions in his will, and duly signed by the party, may, as to a certain purpose, have a legal operation as a testamentary instrument, so as to sustain the intention of the party; and may be considered so without impeaching the rule of law. So in *Metham v. Duke of Devonshire*, 1 Wms. 529., the deed re-

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† The learned judge did not mention the name of the case or the page, but it is presumed from his statement of it, to be the above case.

ferring



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ferring to the will, the Court connected them together; that case was stronger than this, and therefore, as to this point, if the instrument be a testamentary paper, and can have a *legal operation*, it must be so considered: and that introduces a third question, as to the freehold estate: and it has been argued, upon the ground of these instruments being connected together, that the freehold will pass, though the latter instrument is not executed within the statute of Frauds. It has been said, that where there is a *prospective reference* to what is to be done, the party foregoes the benefit of the statute, and the subsequent instrument shall have the same effect as if duly attested by three witnesses, as *quisque potest renunciare juri pro se introducto*. But it will be found, throughout this statute, that it was not enacted for the benefit of testators, but for great public purposes. By the common law, a man could not devise real property: and after the statute of Devises had passed for that purpose, it had been found that frauds and impositions had been introduced, and that men had been acted upon when in *articulo mortis*: to prevent such undue practices, the statute of Frauds was enacted, directing that, unless the instrument is attested by three witnesses, it shall be utterly void and of no effect. So that it is not leaving it to the choice of the party, or competent for him to resist the idea of imposition; but it is a public provision, and the law requires this essential formality of attestation: and, therefore, this cannot be [\*] sustained as a testamentary paper operating upon the real estate, upon the notion that the party could forego the benefit of the statute. It is true, if a testator in his will refers to a paper previously written and so describes it, there is no doubt of its validity; and if the testator executes his will, with the legal attestation, that paper so referred to, makes a part of his will, and the same thing as if actually inserted in it, for words of relation have their full meaning; as in Co. Lit. sect. 1, *A. enfeoffs B. and his heirs, B. re-enfeoffs A.* (16) (omitting the word *heirs*), yet *ex relatione* Lord Coke says, *A. shall take an estate in fee*: but the difference between such a case and a declaration of future intention, is very striking: for the one refers to something already mentioned; whereas the other is a declaration, that, in some future *paper*, he means to do something more; and that future disposition must be either by some act *inter vivos*, or by will; it cannot be supported under the idea of reserving by will the limitation and appointment of certain uses. It was said, that where the party was seised of the legal and equitable interest, it is no more than a devise of that equitable interest, and not a limitation of a use, when he executes a power collateral to the estate; and that the estate is out of him: but he has parted with nothing, he has the same dominion over the estate, and therefore it must pass, not by virtue of the power, but the *ownership*: if it is to pass the ownership, it must pass it as by will, and if so, by an instrument properly executed and attested by three witnesses. This instrument is not so executed, and cannot therefore have any operation upon the freehold estate; and as to that property, it is perfectly immaterial whether it be held a deed or a will; for if by limitation, as a deed, it is too remote; and if by will, it is not executed according to the statute. Then the next question is, whether this instrument can operate upon the copyhold estate, which was previously surrendered to the uses of the testator's will; it is not now to be disputed, that where a man surrenders a copyhold estate to the use of his will, he may devise that estate by any paper in the nature of a will, and the estate will pass, though the instrument is not executed according to the statute, as the devisee takes under the surrender; it is therefore clear, that, if this instrument be considered, as a testamentary

(16) "As fully as he hath enfeoffed him." — From Mr. Bell's MS. note.

paper,

paper, it is sufficient to pass the copyhold estate; provided upon the construction of it, it is intended to pass it; no objection can hold, as to the formality of it: as to the [\*] construction, if the conveyance had been made upon the marriage of *Betty Nuttall Hill*, at the time appointed by the testator, there would have been no difficulty in giving effect to all the limitations in both these instruments. *Betty Nuttall Hill* was then living; the trustees might have conveyed to *Betty Nuttall Hill* for life, then to trustees to preserve, &c., and then to her first and other sons in tail male, then to her daughters in tail, and then to her in tail general, because the daughters of the sons would otherwise be thrown out, and by implication there would have been an estate tail general, in remainder, to herself, then to trustees to preserve, &c., then to the sons and daughters of the son, and to the right heirs of the surviving trustee. According to the true construction of these two instruments, taken together, the conveyance should certainly have been made upon the marriage of *Betty Nuttall Hill*, at that instant; but still it might have been made upon her death without issue, because it was to be limited over to the heirs male of the testator, in the nature of a springing use; and what might have been done then, may still be done: and the present surviving trustee must limit the uses of the surrender to the heir of *Samuel Hill* and his heirs, during the life of the trustee, with remainder to the right heir of that trustee; the freehold estate must be limited to the right heirs of *Samuel Hill* in fee. (17)

Mr. Justice Buller. — The first point to be considered is, whether this instrument be or not a testamentary paper, it must be observed, that the paper in question does not affect the personal property; and, therefore, when the Ecclesiastical Court permitted it to be proved, they acted without any jurisdiction whatsoever. But it is acknowledged, that the testator did not intend to make a will, when he executed this instrument: whether he himself would have called it a will or a deed, is one question; but how it should now operate in point of law, is another; and must be governed by the provisions contained in the instrument itself. A deed must take place upon the execution of it, or not at all; though it is not necessary, that it should convey an immediate possession. A will is just the reverse, and can only operate in future after the death of the testator. Upon the face of this instrument, it is clear that the testator meant that this paper should not have any effect till at a very distant period after his death: it is a direction to trustees what they shall do in the [\*] future limitations of his estates: these parties had no capacity to act until after the death of the testator. It may be expected that I should take some notice of what had passed in the Court of

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(17) Lord Eldon C., in *Stansfield v. Habergham*, 10 Ves. 281, 282., disapproved of Mr. J. Wilson's course of reasoning in this judgment. His Lordship there says: "As to the freehold estates the trustee was bound to make a conveyance limiting them after the failure of issue of the grand-daughter (as there was then a contingent remainder), so as to vest in some person the legal interest during the lives of the trustees and the survivor, to give that person (not the beneficial interest, but an estate, the benefit of which would result, as every thing undisposed of would, to the heir; but) an estate bound by a trust to preserve the contingent remainder if it should take effect. Lord Thurlow's reasoning in *Harrison v. Naylor*, (antea, 5 vol. 110. and notes (2) and (3) *ibid.*) when he said the limitation would be to the heir male of *Elizabeth Harrison*, if she should have one, his heirs and assigns, and if she should not have an heir male, then to the heir of the testator, his heirs and assigns, was more correct than that of Mr. Justice Wilson. The proper mode of executing the purpose would not have been, as put by Mr. Justice Wilson, to have limited to the heir at law an estate *pur autre vie*: that is, for the lives of the trustees, and the survivor; for if that was a legal estate, there would have been nothing to prevent the heir, in certain circumstances and events, creating a forfeiture of that estate *pur autre vie* before the contingency took place. It would, therefore, have enabled the trustees to defeat the very conveyance directed to be made. In *Robinson v. Litton*, until the contingency happened, the son had the whole estate."

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 MASSACHUSETTS  
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King's Bench, when the case came before them, and, if I was dissatisfied with the judgment of the Court I should be ready to say so; because it is better to correct, than to persist in an error: but it is unnecessary to do so; for upon reading over this instrument, the case struck me very differently from what it did when it came into the other court. And that leads me to say where the difference consists.

The testator thought he had invested himself with a power, under his will, of executing future limitations of his estate: absurd as that was, the deed, as considered in that court, was reported to be an actual appointment to take effect *instantly*; but, upon looking into the paper itself, it is in *futuro*, which makes the great difference between that which was produced in the King's Bench and the present case: and when it was argued, not one of those cases, quoted by the *Attorney General* were mentioned or adverted to at the bar, (nor did they occur to me,) which go the length of saying, that whether as a deed-poll or an indenture, if the obvious purpose is to take effect in *futuro*, it shall operate as a will. These are cases both at law and in equity, and expressly so in two cases, where the words "give and grant" were inserted. Upon the whole complexion of this case, the paper appears to take effect after the death of the party: and, upon this ground, it must take effect as a codicil, and I shall call it such.

The next question is, what effect this codicil must have upon the freehold estate: I concur with my brother *Wilson*, that it is void for want of due attestation. The case has been argued in analogy to those where charges have occurred of debts and legacies, *Williams v. Duke of Bolton*, Easter Term, 1781, has been cited: The testator made a will, and afterwards added a codicil, giving legacies and annuities; the legacies to be raised under the trust of a term: and, under the particular circumstances, legacies were deemed to comprehend annuities: and that decision did not go further than the Court had gone in the case of *Brudenell v. Boughton*, 2 Atk. 268.; *Reay v. Hopper*, in Can. 10th March, 1785, and *Hyde v. Hyde*, 1 Eq. Abr. 409., where the legacies were included in the charge, upon the ground that the Court has allowed legacies to be debts and charges, and so held by Lord *Kenyon*, [\*] in giving judgment in *Reay v. Hopper*, where his Lordship says, "I have gone no further than Lord *Hardwicke* had done, where the will had made the land subject to the legacies generally, those by the codicil were held charged;" but in *Hyde v. Hyde* the Lord Chancellor excepts the case of a *rent*, so that a rent would not pass as realty, unless the instrument was attested by three witnesses; and before the statute of *Fraud*, it could not pass, as being comprized under the word tenements. But the *Attorney General* put the case of a charge upon the land by will, and afterwards the testator charged the land by bond to any amount, that it would be a good charge. If this argument were well founded, it would prove that all the cases have been badly decided; but they have held that it is not the same thing, for it passes by the will, and not by the codicil, though formally attested; upon the ground that the land is considered, as an auxiliary charge created by the will. There is another case, shewing the difference between a paper executed before the will, and a codicil subsequent to the will, *Doe upon the demise of Salthorp v. Taylor*, B. R. Mich. 11 Geo. 3. "A. devised all her lands to —, except such as she might dispose of by codicil; she made a codicil but not executed within the statute; the Court held, that, if it had been extant at the time the will was made, it would have been valid; but being afterwards, it could not operate as a revocation of the will. The will must stand, as if no such codicil had been made; for a codicil so executed, is as no codicil, and the estate, not being disposed of by the will.

will, it descended to the *lessor and heir at law*, for want of a codicil properly executed.

The third question is, what is the effect of this codicil, as to the copyhold estate. The will can only operate as an appointment, directing the uses of the previous surrender, whether the instrument be well executed or not. It has been decided in many cases, though to the dissatisfaction of Lord *Macclesfield* and Lord *Hardwicke*, but they thought themselves bound by precedent, and declared, that however they might wish the law to be otherwise, they could not alter it. Lord *Macclesfield* in particular expresses himself to that effect in *Wagstaff v. Wagstaff*, 2 Wms. 258., and so says Lord *Hardwicke*, in the *Attorney General v. Andrews*, 1 Vesey, 225., after these authorities, no doubt but that the copyhold will pass; and the only question then is, what is the nature of the limitations created by this codicil; and the result of the events (\*) which have since happened, and the effect of the limitation over in

As to the limitation to the right heirs of the survivor, it strikes me, as a contingent remainder, and that it ought to be considered as the limitation of the trust only: no equitable interest is limited to the trustees, and the rule of this court is laid down in the *Bishop of Clonme v. Young*, 2 Vesey, 91. that, if for one purpose, they are considered as trustees, they shall be so throughout: unless, by some express devise, they are made otherwise. Had the conveyance been called for immediately after the death of the testator, it must have been in the form stated by Mr. Justice *Wilson*. If a legal estate, the contingent remainder would have become void, as to the copyhold, as well as the freehold, *Lane v. Pannell*. A passage from Lord Chief Baron *Gilbert* infers, that this being a trust estate, it falls under a different consideration. In *Hopkins v. Hopkins*, For. 44. Lord *Talbot*, according to the report of his decree, seems to have relied upon the difference between a trust estate and a legal estate, as to a contingent remainder; but Lord *Talbot* never did give such an opinion: it is true the point was made before him, and he observed, "it has been said at the bar, that as these were limitations of a trust, they were good as executory devises, and not as contingent remainders;" (but he adds) "as to this point I give no opinion, because it is unnecessary." This cause was heard by his Lordship in 1734, and in the year following came *Chapman v. Blisset*, Cases Temp. Talb. 145. which was the first, in which he held it an executory devise, but then he considered how it would stand as a contingent remainder, and, even as such, he held it would be good, though a trust, and would not fall to the ground as at law. This is a material authority: as it may be presumed, that this case following so quickly that of *Hopkins v. Hopkins*, his Lordship had given it full consideration. *Hopkins v. Hopkins* afterwards came before Lord *Hardwicke*, who gave a direct opinion upon the point, and quoted *Chapman v. Blisset* as a direct authority, that an estate to trustees would be sufficient to support contingent remainders, though the prior estate for life might fail. Then, as to the manner of making the conveyance, it is immaterial whether express or implied: it is plain then, it should be in the form as mentioned by my brother *Wilson*, "to him and his heirs during the life of the trustee." Lord *Thurlow* so reasons in *Harrison v. Naylor*. (18)

(\*) These authorities fully establish, that the trust remained in the

hi (20) Mr. Brown's report, however, of *Harrison v. Naylor* was most materially incorrect upon this point. See the Editor's notes (2) and (3) upon that case, ante, 3 vol. 100. 2 Ves. jun. 235. note. This inaccurate statement led the judges into the above error, as noticed by Lord *Eldon* C., in *Stansfield v. Habbergham*, 10 Ves. 281, 282, and extracted from thence in the preceding note (17), ante, 384.

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heir at law; and the conveyance may be so directed, as that the trust may take effect.

Lord Chancellor. — Concurring in opinion with the learned judges, nothing remains for me, but to state the *precise* point upon which my opinion takes the same direction: upon the will there is clearly a resulting trust for the heir at law, so far as there is no disposition of the beneficial interest to the trustees; 2dly, that the instrument, though called a deed, is in its nature testamentary, and dependant upon the will, and will have all the effect of a testamentary act, as far as by law it can avail as such; 3dly, there is no difference between this court and a court of law as to the effect or validity of such a testamentary paper so executed; and being attested by only two witnesses, it cannot pass the freehold estate contrary to the provisions of a positive law. The act so done has no effect whatever. The distinction is obvious between a will duly executed, and coupled by reference to a *prior instrument*, and a writing incomplete, as to lands to be disposed of by ulterior directions in an instrument to be executed afterward. It was very much contended, that this Court had given a more favourable construction, with regard to an *informal* codicil, and that where a will created a charge upon the realty for the payment of debts and legacies, legacies given by such a codicil will attach upon the real estate charged by the will. The cases of *Hyde v. Hyde*, *Masters v. Masters*, *Brudenell v. Boughton*, *Earl of Inchiquin v. Obrian*, have been cited for that purpose. *Hyde v. Hyde* is a singular case, and the Court rested much upon the peculiar circumstances of it; but that is, in fact, no decision, because it afterwards turned out to be unnecessary, as there were several funds out of which the parties were to be paid, and the legacies were marshalled, and the question never arose whether the legacies contained in the second paper should be charged upon the real estate. In *Masters v. Masters*, Sir Joseph Jekyll gave a decisive opinion, that all the legacies being charged upon lands, the legacies given by the codicil, although informal, should be included. In *Brudenell v. Boughton*, Lord Hardwicke, reasoning upon this point, observes, he is of the same opinion: and in the case of Lord *Inchiquin v. Obrian*, where the question necessarily [\*] arose, (Ambl. 33. by the name of Lord *Inchiquin v. French*.) he is reported to have admitted it as the ground of his determination, and refers to his opinion in *Brudenell v. Boughton*. (19) These cases have, from some inaccuracies, been said to have proceeded upon the ground, that the charge must be supported in respect to the will, the testator having *completely* charged his real estate with legacies, and that it was in the power of the testator to increase the charge by any future act. There does appear to be some incongruity in a power reserved, which cannot operate during life; but the observation made by Mr. J. Wilson, is, that it is not a *personal power*, if the ulterior deed is to be deemed a testamentary act; and if so, it must then be executed according to the forms prescribed by the statute. In *Brudenell v. Boughton*, from a MS. note, it appears, that Lord Hardwicke stated the ground to be upon the analogy of the case of *debts and legacies*. (20) All the cases alluded to, are cases, not of a primary charge, but in aid of the personal estate, which is the primary fund. Such a charge, whether for debts or legacies, is neces-

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(19) In Lord *Inchiquin v. French*, Amb. 41., Lord Hardwicke expressly states, that determining the personal estate to be the primary fund, determines the question whether a legacy given by a subsequent codicil, unattested, is a proper legacy. — From Mr. Bell's MS. notes.

(20) The true ground of *Brudenell v. Boughton* proceeds on the analogy between debts and legacies. The lands in the cases mentioned were only charged to supply the deficiency of the personal estate. The reasoning will not extend to the case of a primary charge. — From Mr. Bell's MS. notes.

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sarily uncertain; and its extent cannot be ascertained by the testator, because the amount of the personality is a matter of uncertainty as to its extent, and whatsoever will affect that fund, must vary the amount of the charge; therefore the legacies given by a will executed, are revoked by a codicil not properly executed, because the charge is to answer the sum allotted for the legacy, and if the legacy is struck out of the will, it never comes into the account; if legacies are added, they affect the real estate, by diminishing the personal; which the party may do during his life. The charge of legacies is good in its creation, if well executed; and the charge of the legacies undiminished in the amount, where the primary fund is the personal estate, because the deficiency is to be made good out of the realty: therefore it is obvious that the statute of Frauds does not affect it, because it does not prevent the making a *contingent* charge: but it goes no further than the *case of legacies*, and cannot bear any *application* to land itself, or any reserved part of it not disposed of by the former will; nor to the case of a charge originally and exclusively imposed upon the estate, which could not be revoked, diminished, or enlarged by a *future deed*; therefore we cannot go beyond or shake these authorities, which as to the present point, do not avail with respect to the copyhold estate. The rule [\*] alluded to; that the disposition of this property is not subject to the form prescribed by the statute of Frauds, has been so long established, that it would be extremely improper to vary it; and therefore this instrument will not affect it: and the only remaining question is, whether the limitations are capable of taking effect; with respect to that I should but ill repeat what the learned judges have already so ably said; and therefore have only to give the necessary directions. — The consequence is, that all the rents and profits must be decreed to the heir at law. † (21)

[ \*390 ]

† Lord Chancellor, in the course of this cause, observed that the report of *Hopkins v. Hopkins*, in 1 Atk. 581. *et seq.* was incorrect; but that his copy was corrected; with the loan of which his Lordship honoured the reporter, with permission to communicate the corrections to the public: they are as follows: —

Page 589. — The three first paragraphs should stand thus: —

“ But in this case, the trust estate vested in *William*, and at least for life, (for it must be admitted that the proviso did not suspend the vesting) which being a freehold, was capable of supporting remainders; and, consequently, according to the doctrine in the case of *Purfoy v. Rogers*, 2 Saund. 380., and other authorities, the subsequent limitations ought to be considered as remainders; and in truth, although the first estate in *William*, who was not born at the testator's decease, be construed an executory devise, yet are not the subsequent limitations to be taken as separate and distinct executory devises, but as parts of the same devise.

“ The case is therefore reduced to this question, whether the legal estate in the trustees, will support these remainders.

“ Before I proceed to the discussion of it, I will observe that it is not necessary, in order to bar the plaintiff from having a conveyance, that all the intermediate limitations between the estate vested in *William*, and that limited to him, should be good subsisting contingent remainders, but it is sufficient if some of them are good.”

(21) Lord Loughborough declared that the plaintiffs, *Martha*, the wife of the plaintiff *J. H.*, and the plaintiff *W. Wyde*, were entitled to the freehold estates in question as co-heirs at law of the testator, subject to the charges thereon, by his will, in proportion with the copyhold estates in question; and declared that the copyhold estates in question were all devised by the will and codicil to the uses, and upon the trusts therein mentioned; and that upon the death of the defendant *Stansfeld*, his heir at law or customary heir would be entitled to such copyhold estates, according to the custom of the manor under which the same are held, subject to the payment of a proportionable part of the sums charged thereon, according to the respective values of the said estates, and that in the meantime the plaintiffs were entitled to the rents and profits thereof accrued since the death of *Betsy Nuttall*, as administratrix of *R. Hill*, and since the death of the said *R. H.*, in their own rights, and also to the rents and profits thereafter to grow due from the same during the life of the defendant *G. Stansfeld*, &c. &c. &c. *R. L.*

## CASES ARGUED AND DETERMINED

Page 590. The fourth paragraph should be as follows:—  
 "Secondly, Because to allow such of the limitations as are not too remote, to be good, will not affect any rightful power of alienation in the *cestui que trust*, which the law allows to owners of legal estates, and consequently, do not tend to a perpetuity."

The eighth paragraph should begin thus:—  
 "That will not follow; for if there are ever so many contingent limitations of a trust, it is an established rule, that when any demand is made against the estate, it is sufficient to bring the trustees before the Court, together with him in whom the first estate of inheritance is vested, &c."

Page 591. read the conclusion of the fourth paragraph thus:—  
 "Nor, some go so far as to say, a bargain and sale alone, by a tenant in tail in fee, shall have the same effect as a fine."

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Page 591. Instead of the last paragraph, and that which follows in page 592, read thus:—  
 "Nor have courts of equity ever supported the destruction of contingent remainders, by tenant for life, but have endeavoured to support them where there hath been no reversion at law, and so in cases of merger they have rooted terms for raising younger children; and where the terms were merged at law, for the sake of creditors, and other equitable purposes, as in *Rowley v. Morgan* 3 Vern. 90."

The sixth paragraph in page 592, should stand thus:—  
 "The principal objection is, that the legal estate in the trustees, and the equitable in the *cestui que trusts* are of different natures, and the one cannot support the other."

In the next paragraph of the same page, after the recital of the statute, the passage should be thus:—

"By which the legal estate is executed to the uses, and *cestui que uses* has the legal estate, just in the same manner as the use before; the consequence whereof is, that the legal estate either became vested immediately, or if not, then the estate went over immediately to the next remainder-man, as it would in the case of a common law fee: so if it is construed in *Chadleigh's* case, and if it once goes over, it bars *after claims* back again."

In page 593, the conclusion of the third paragraph, instead of the words "before cross remainders, &c." read thus:—

"And therefore interposed between the estate for life and the remainder, an estate to trustees to support contingent remainders, though there was no such direction in the will."

## NEWMAN against ROGERS.

Thorn's Inn  
Hall, 4th July

(Reg. Lib. 1792. B. fol. 421.)

Upon sale of a reversion (1) a part of the terms was, that the purchase-money be paid by a certain time; not being so, by default of the vendor, vendor discharged from his contract. (1)

THE plaintiff being seised in fee of the reversion of the manor of South Cadbury, North Cadbury, Strathold, and of other premises Com. Somerset expectant on the death of his father, in the month of December, 1788, contracted with the defendant for the sale thereof, at the price of 6,922*l.*, and a memorandum was made of the agreement, and the defendant paid to the plaintiff one guinea as earnest money.

The plaintiff finding he had been imposed upon in this contract, filed his bill to be relieved from it; and the defendant filed a cross bill to establish it: and after some proceedings in said suit, it was agreed between the parties, to accommodate the matter in dispute, and that another agreement should be entered into, and accordingly a fresh

(1) Contracts for the purchase of reversionary interests are of a very different nature, as to the effect of time upon them, from such as are relative to estates in possession and of a permanent nature; for, independently of what is observed by the Lord Chancellor in *postea*, 593, it may be said, that the delay infects the very essence of the contract, by giving the party who occasions it a most unequal advantage in bringing the reversionary interest so much the nearer to its enjoyment than was contemplated by the other party at the time of the bargain. — Editor.

As to the effect of time on ordinary contracts, see *Finck v. Curtis*, *antea*, 386, and the references.

NEWMAN  
 against  
 PAYNE  
 [1798.]

agreement was made, bearing date 1st March, 1791, reciting the former agreement, and that the defendant relinquished the said former agreement, so far as [\*] related to South Chisbury, it was agreed that the plaintiff should sell to the defendant the premises (exclusive of the premises agreed to be excluded) and it was agreed, that the defendant should retain 1000*l.* part of the purchase-money, as an indemnity against a mortgage to Simon Payne; and the defendant was to pay the purchase-money within five months from the date of the agreement, and the defendant further covenanted, that in case Francis Newman, the elder, should die without leaving issue male of his body, and the plaintiff should perform the agreement on his part, and that Frances Charlotte Newman, daughter of the said plaintiff, should attain her age of twenty-one years, or marry with the joint consent of the plaintiff and defendant, (her uncle) the defendant should pay to such persons as the plaintiff should appoint as guardians or trustees for his said daughter, 50*l.* per annum for her maintenance, and upon her attaining twenty-one or marriage, should pay to the said Frances Charlotte Newman, the sum of 1000*l.* for her sole use and benefit; and in case of her death under age and unmarried, should pay the same to the plaintiff; and it was agreed that both the bills should be dismissed.

The defendant, at the time of executing the last agreement, paid 2000*l.* of the consideration-money. — A draft of the conveyance was prepared, and approved by the plaintiff's attorney, but no steps were taken by the defendant to carry the agreement into execution; but about the 2d of May, (being the day fixed for that purpose) the plaintiff offered to execute the conveyance, but the defendant refused to perform the agreement or pay the 2000*l.*, agreed to be paid at that time; and upon the 6th of May, the plaintiff's agent wrote a letter to the defendant, mentioning that the plaintiff and himself had attended at the chambers of his (the defendant's) agent, for the purpose of completing the agreement, but that he had said he was not prepared with the money for that purpose, or intended to complete the purchase; on which they had given him notice, that the plaintiff would not then consider himself bound by the contract, that he (the agent) had read the defendant's letter to the plaintiff, by which he found that Payne insisted that he had a mortgage on the premises for 2800*l.*, which the plaintiff did not admit, but offered to deposit the whole sum, out of the purchase money, provided the defendant was ready to complete the purchase, by [\*] twelve o'clock on the twelfth of that instant May, and if the defendant refused, that the plaintiff should take steps for the sale of the estate; the defendant returned no answer, to this letter, and although the plaintiff attended at the time and place named, and offered to complete the contract, the defendant did not attend, or send any instructions on the subject.

The plaintiff filed the present bill, stating as above, praying that the agreement might be set aside, or the defendant decreed specifically to perform it, and pay the purchase money with interest. At the hearing, an objection was taken for want of parties, as the said daughter was not before the court.

But Lord Chancellor over-ruled the objection, as the agreement on her behalf was purely voluntary, on the part of the father, and he might have released or relinquished the same, without her consent.

After the argument, Lord Chancellor gave judgment to the following effect.

After stating the first agreement in which the time was fixed, he said, it is of the essence of justice, that such a contract, as this, being of a reversionary estate, should be executed immediately and without any delay.



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*NEWMAN  
vs.  
PAYNE*

No man calls a reversion who is not distressed for money, and it is ridiculous to talk of making him a compensation, by giving him interest on the purchase money, during the delay. (2)

His Lordship then stated the second agreement, which he said bore upon the face of it, an acknowledgment by the defendant, that in the first agreement, he had too good a bargain; for in the first place, there is an additional sum of 1000*l.*, to the former consideration; and in the second place, *South Cadbury farm*, which was included in the first is omitted in the second agreement.

The first agreement was by consent of both parties completely done away, and lost in the second.

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[\*] The alarm of the defendant, on discovering the extent of *Payne's* mortgage, was without foundation; for had the claim of *Payne* been well founded, he had an equity of having the mortgage cleared off by the purchase money, as far as it would go; and at all events his refusal to go on with the second contract, after the offer made to him of depositing the whole of the sum claimed by *Payne*, leaves him without excuse. But, by his answer, he insists upon his being wholly released from the second agreement, and resorting to the first. I release him, therefore; and though it was part of the second agreement that both bills should be dismissed, yet as neither has been, so let him go on, if he thinks proper, with his bill for enforcing the first contract; if he does, *Newman* may easily amend his cross bill, and charge the second agreement, and so get rid of it.

With respect to the interest of the daughter under the second agreement, it will be no impediment to the decree, I shall make; (3) for part of the decree will be, that 1000*l.* be paid into court, by the plaintiff, to be secured for her benefit, as under the second agreement; and then let the second agreement be delivered up, with costs to be taxed by the Master.

(2) *Vide* note (1), *ante*, p. 391.

(3) The decree as to this is as follows:—

“And the defendant objecting that *F. C. N.*, the infant daughter of the plaintiff *F. N.*, is a necessary party to this suit, in regard she is interested in a sum of 1000*l.*, and the plaintiff *F. N.* to obviate the objection, consenting to pay the sum of 1000*l.*, on or before the 27th July, instant, into the Bank, &c., for the benefit of the said *F. C. N.*, the infant, according to the terms of the said articles of agreement. His Lordship doth order and declare that the plaintiff *F. N.* do, &c. &c.”

The decree then directed interest to be computed on the sums of 500*l.* and 1*l.* 1*s.*, paid by the defendant to the plaintiff *F. N.*, at the rate of 4 per cent. The Master was then ordered to tax the plaintiff's costs, which amount was to be deducted from the amount of the 500*l.* and 1*l.* 1*s.* and interest, the remainder of which was to be paid over to the defendant, after which the articles of agreement were to be delivered up to be cancelled. R. L.

[*Vide* S. C.  
2 Ves. 238.]

*Lincoln's Inn  
Hall, 8th July.*

Request of real  
and personal  
estate to  
trustee, to take  
a house for a school,  
to educate children,  
and grand-children of  
particular persons, and  
other children;  
good as to the particular  
objects, but bad as a  
general charity. (1)

BLANDFORD and Others against FACKERELL.

(Reg. Lib. 1792. A. fol. 550. b.)

**EDWARD FACKERELL**, seised of real estates in *Middlesex*, and possessed of personal estate, made his will duly attested to pass real estates, 29th of October, 1781, and thereby, after providing for a weekly

(1) Upon this case see in *Attorney General v. Whitchurch*, 5 Ves. 145., and *Locke v. Robinson*, 2 Merivale, 392. Note particularly the report in 2 Ves. jun.

payment

payment of 4s. to his cousin *James Fackerell*, he gave all his real estate to trustees therein named; (of whom the plaintiff *Blandford* is the survivor) in trust to sell, and the money arising from such sale, and from the sale of his personal estate and effects, to be laid out in 3 per cent. consol. annuities; the dividends thereof to be first applied to the payment of the annuities and of the weekly sums given by the will, then to apply the residue according to a direction of the testator in his will, that is to say "I do hereby direct that as soon as conveniently may be, after my decease, a proper and commodious house, in the said town of *Bridgewater*, shall be taken by my [\*] trustees, on lease or otherwise, at such yearly rent as shall be agreed upon, and fitted up for a school, for the reception and education of the children, and grand-children of my relations, (naming them,) as they shall respectively attain their age of seven years, I will and direct that my said trustees shall place and cloath in the school, &c., until their age of fourteen years; and then to put them apprentices, &c.; and that my said trustees shall also admit and take into the said school, such number of boys and girls (the boys being two to one of the girls) as the yearly income of my trust stock; from time to time, will be sufficient to educate, after payment of rent, &c., the salary of Masters and Mistresses and other purposes there mentioned." He then gave several regulations for the charity, and made the trustees executors.

The testator died soon after, leaving his said cousin his heir at law.

The trustees sold the personal estate, invested the same in 3000l. 3 per cent. consol. and hired a house in *Bridgewater*, and a school-master was appointed, and they educated and cloathed the children who were within the description of the will, and some other children, and paid the expences out of the rents of the real estate, and the dividends of the stock.

*James Fackerell*, the heir at law, being dead, and the present defendant, *Fackerell*, his son, claiming to be entitled as such, and that the devise was void, and also claiming the rents and profits of the real estate during his father's life, as part of his personal estate, (he being his personal representative,) the plaintiff, the surviving trustee, and the other plaintiffs (the children named in the will) filed this bill against him, and the *Attorney General*, praying that the testator's will might be established, and the trusts thereof carried into execution, and that proper directions might be given for that purpose.

The defendant *Fackerell* submitted that the devise was void, and claimed to have the real estate delivered up to him, and an account of rents and profits. And the *Attorney General* put in the common answer.

[\*] Mr. *Attorney General*, Mr. *Alexander*, and Mr. *Campbell*, in support of the charity.

The plaintiffs are the trustees and the persons to be benefited by the will, the question turns principally on the clause that a proper house shall be taken for the purposes of the charity, on behalf of the children and grand-children to be benefited. We submit that this charity may be maintained; as far, at least, as to the personal estate. As to the real estate, it may be difficult to maintain it. The trustees acted on the supposition that the charity might be maintained as to the personal estate; but that is now doubted, in as much as it is a direction to take a lease. The statute prohibits the gift of land, or of money to be laid out in the purchase of land, or any interest in it. And the question is, whether this can be called a purchase. There is no authority clearly in point; but there are some that bear strongly upon it, to show it not to be illegal. In *Gastrel v. Baker*, cited in *Vaughan v. Farrer*, 2 Ves. 185. Lord *Hardwicke* carried the charity into execution by hiring an house. It may

1793.

*Blandford*  
against  
*Fackerell*

[ \*395 ]

[ \*396 ]

THE COURT OF CHANCERY  
IN THE CASE OF  
THE TRUSTEES OF THE  
SCHOOL OF BRIDGEWATER  
VERSUS  
JAMES FACKERELL  
AND  
JAMES FACKERELL  
SON OF THE ABOVE  
NAMED JAMES FACKERELL

1793

RECORDED  
REGISTERED  
RECEIVED

[ 200 ]

[ \*397 ]

may be taken, therefore, for granted, he would have done the same where it was part of the direction of the will. That case is correctly stated, and in the principal case of *Vaughan v. Farver*, Lord Hardwicke expressed himself to the same effect. Again, this is not within the mischief to be remedied by the statute, the making lands inalienable: here they may hire from time to time. But if it is not good as a general gift, it is good as a specific gift to the persons to whom it is given. There is no doubt, but from the case of *Grievess v. Case*, (*ante*, p. 67.) where Lord Thurlow thought the gift of the annuities good, as personal bounties to the ministers; but the Lords Commissioners thought they were given *ed ratione* as ministers, and therefore part of the general gift. But here, it is good as a personal gift, *Doe dem.* of *Phillips v. Aldridge*, 4 Term Rep. B. R. 264., it is given to persons sustaining a certain character, as children and grand-children: it may be separated from the charity and go, as far as by law it can, that is, to all the children and grand-children born at the time of the gift.

Mr. *Solicitor General* (for the heir at law, who is also personal representative,) the question is, whether this is any thing more than a public charity, with a particular benefit to such of the founder's kin whose situation makes them the objects of a public [\*] charity. In *Grievess v. Case*, the general instruction was to found chapels, with a nomination of the first ministers; so here the general intention was to found a public charity, and to give the first nomination to his own relations, the other places to be filled by persons to whom the gifts cannot be good. It must be confined to children and grand-children of persons living at the time.

Lord Chancellor. — The first object of the testator is to give education to these children and grand-children, and then that a benefit should arise to others from his bounty. I can only devise a plan for the education of the objects of his bounty, and direct an enquiry who are such: as far as it tends to establish a charity for general purposes, it is void, by the statute of Mortmain. (2)

Bill dismissed as to the *Attorney General*.

(2) The Court declared that the devise and bequest, &c. was void, as a devise for the general purposes of establishing a charity, as being within the act, &c.; but that the children and grand-children of the several persons named in the testator's will were entitled to the benefit of the dispositions made in their favour by the said will, so far as the objects thereof were not too remote. It was there declared that the devise and disposition contained in the said testator's will (except as aforesaid) were to be considered a trust for the said testator's heir and next of kin. The trustees were ordered to lay a plan before the Master for educating the persons who were objects of the testator's bounty, so far as the disposition made by the testator was a valid one under the declaration aforesaid, and for placing such persons out apprentices, &c. The Master was ordered to ascertain who were the objects of the testator's bounty, according to the above declaration, and under what rights they claimed. R. L.

[1793 S. C.  
2 V. 6. jun. 261.]Lincoln's Inn  
Hall, 13th July.A charge upon  
a lunatic's  
estate, falling  
in to him as  
representative of

Lord COMPTON against OXENDEN, Bart. (1)

(No Entry.)

BY articles of agreement, dated 24th of July, 1793, and made previous to the marriage of John Bromfield the elder, and Elizabeth Webb, reciting the intended marriage, and that said Elizabeth Webb, was seized of his sister, shall sink for the benefit of his heir. (1)

(1) See note (1) next page.

in

in fee, in possession and reversion, of the real estates therein mentioned, and possessed of a considerable personal estate, said *John Bromfield*, in consideration of the said then intended marriage and of the fortune, covenanted with trustees therein named, that he would within one year convey, to the trustees, freehold estates of the yearly value of 300*l.* in trust to the use of himself for life sans waste, remainder to his then intended wife for life, remainder as to 200*l.* per annum, part of said 300*l.* per annum, to the use of the first and other sons of said marriage in tail male, with a reversion in fee to himself; and as to the remaining 100*l.* per annum, after the death of himself and his intended wife, to and amongst such children of said then intended marriage, as they should in manner therein mentioned direct and appoint, subject nevertheless to a proviso, that if there should be one or more younger children of the then intended [\*] marriage, the sum of 1500*l.* should be raised, from and after the death of said *John Bromfield* and his said intended wife, to be charged and chargeable upon such last mentioned 100*l.* per year, for the younger child or children of said then intended marriage, to be paid and payable to the son or sons at twenty-one years or marriage, which should first happen, and during the minority or minorities of such younger child or children, such 100*l.* a-year should be charged with interest for their maintenance; and the said *John Bromfield* further covenanted, to settle a further estate of 100*l.* over and besides said 300*l.* per annum, on having his wife's reversionary estates conveyed to him, upon trust for the uses therein mentioned; and further covenanted, within two years, to convey unto said trustees a further freehold estate, to be purchased, of the yearly rent of 200*l.* and which last mentioned estate, should be so settled upon them the said trustees, in trust for himself for life, sans waste, remainder to the eldest son of the marriage in fee, subject to the payment of an additional sum of 1500*l.* for a portion or portions of the younger child or children of the said marriage, to be paid and payable, and to be applied to the same uses, and in such manner as the said first mentioned sum of 1500*l.* and it was further agreed, that in case the said *John Bromfield* could not conveniently purchase estates of the yearly value of 600*l.* according to the covenants, within the times thereby limited, that he should lay out a sum of money, equal to the value of the estates, on some good security, in the names of the said trustees, in trust to be applied for the purchasing of lands to be so settled as aforesaid, until such purchase or purchases could be so made.

The marriage took effect, and there was issue two children, *John Bromfield*, and *Elizabeth Bromfield*; a fine was afterwards duly levied by *Bromfield* and his wife, of the estates of the wife, and by a deed, dated 11th of January, 1731, to lead the uses of such fine, the same were declared to be to the uses, and for the intents and purposes therein mentioned.

By indenture of lease and release of the 6th and 7th May, 1731, reciting the aforesaid marriage articles, and that said *John Bromfield* was seised of several manors, &c. therein mentioned, of the yearly value of 300*l.* and which he wished to settle, pursuant to the said first covenant in the marriage articles, *John Bromfield* [\*] conveyed the premises therein particularly mentioned, to trustees, upon the trusts therein mentioned, as to certain parts thereof of the yearly value of 200*l.* to the uses to which the 200*l.* a-year, in the first place, was agreed to be settled by said articles of agreement; as to the residue of the premises, of the yearly value of 100*l.* per annum, to the use of said *John Bromfield* for

(1) See the case of *Oxenden v. Lord Compton*, ante, 231. et seq. with the notes and references, and the judgment upon the principal case on the present occasion, as reported in 2 Ves. jun. 264, 265. See also Sir W. Grant M. R.'s observations in *Forbes v. Voffatt*, 18 Ves. 393, 394, &c.

life,

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Oxenden  
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Compton

[ \*398 ]

[ \*399 ]

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 CHAMBERLAIN  
 against  
 OXENDEN.

life, sans waste, remainder to *Elizabeth* his wife for life, remainder to the trustees for a term of 500 years, remainder to such uses as the said *John Bromfield* and *Elizabeth* his wife should appoint; and in default thereof, to *John Bromfield*, (the first son of the said *John Bromfield*, the elder, and *Elizabeth* his wife;) and the heirs male of his body, with such remainders over as therein mentioned, with the ultimate remainder or reversion in fee, to the use of the said *John Bromfield* the father; and as to the term of 500 years the same was declared to be in trust, after the decease of the survivor of them the said *John Bromfield* and *Elizabeth* his wife, to raise the sum of 1500*l.* for the portion or portions of the younger child or children of the said *John Bromfield* the elder and *Elizabeth* his wife, according to the intent of said articles of agreement, being the first sum of 1500*l.* thereby provided, and after payment thereof, &c. the remainder of such term to attend the inheritance.

*John Bromfield* the elder made his will, duly attested to pass real estates, dated 7th March, 1731, whereby, amongst other things, after reciting the marriage articles, and that he had settled lands of the yearly value of 300*l.* to the uses in the said articles mentioned, in pursuance of said first covenant in said articles contained, he ratified and confirmed such settlement; and after giving directions to his trustees therein named to purchase lands of 80*l.* per annum, which, with the said testator's house at *Lewes*, in the county of *Sussex*, would make 100*l.* per annum in performance of his second covenant; which lands and premises, and house, testator directed to be settled in manner therein mentioned; and after reciting that it might be difficult to find a convenient purchase of lands of the value of 200*l.* a-year, to be settled according to the articles, pursuant to the said testator's third covenant, and charged with the additional sum of 1500*l.* for younger children's portions; and that such last-mentioned sum of 1500*l.*, and the interest thereof, might be satisfied out of his personal estate, till such 200*l.* [\*] a-year could be conveniently purchased, and as it might be more convenient for his eldest son and his heirs, to have 3000*l.* and the interest thereof, at 4*l.* 10*s.* per cent. per annum, rather than the rents and profits of 200*l.* a-year in land, thereout deducting the interest of 1500*l.* at 5 per cent. per annum, therefore he thereby directed that, until such 200*l.* a-year could be conveniently purchased, his said trustees should pay such younger child and children interest of the said 1500*l.* from his death, until the said 1500*l.* were payable, and interest as aforesaid for 3000*l.* to his eldest son, for the time being, and such 3000*l.* to his eldest son or his heirs when he should be able to give a legal discharge for the same, provided he should be willing to accept thereof, instead of the last-mentioned sum; but if 200*l.* a-year could be conveniently purchased, the same should be purchased by the trustees; and gave the residue in trust for his son at twenty-one, with remainders over, and appointed *Lawton* and *Gilbert* executors.

*Elizabeth Bromfield*, the wife of *John Bromfield* the elder, died in his life-time, and the testator died 20th of January, 1735, leaving *John Bromfield* junior, his only son, and *Elizabeth Bromfield* his daughter, and only younger child of the marriage.

The testator did not in his life-time purchase or settle any lands according to his second and third covenants; but the executors possessed personal estate more than sufficient, after payment of debts, &c. to make the purchases; and they, accordingly, made several purchases, with money which they declared was the money of the testator, by which means the devised and purchased estates amounted to the full annual value of 600*l.*, and the three covenants were fully satisfied; and the said lands, as to 200*l.* a-year, became liable to the payment of the second sum of 1500*l.*

*Elizabeth*

[ \*400 ]

*Elizabeth Bromfield*, the daughter, attained her age of twenty-one on the 28th of November, 1749, by which she became entitled to the said two sums of 1500*l.*, but the same remain unpaid.

*John Bromfield*, after the death of his father, suffered a recovery of the premises comprised in the settlement of the 6th and 7th of May, 1731, including the premises contained in the five hundred years term, by which he became seised in fee thereof; *Edward Trayton*, [\*] one of the trustees of the five hundred years term, survived *John Newdigate*, his co-trustee, and died: some of the defendants are his representatives. *Nicholas Gilbert*, one of the executors and trustees named in said *John Bromfield's* will, and also one of the trustees named in the said indenture of release of the 7th May, 1731, survived the said *Henry Lorton*, the other of such executors and trustees, and departed this life some time in the month of November, 1774, leaving defendant *Nicholas Gilbert*, his eldest son and heir at law, whom he had also appointed executor, and the fee-simple of estates so purchased is now vested in him.

Upon the death of the said *John Bromfield* the testator, *John Bromfield* the younger entered into possession of the estates comprised in the said indenture of lease and release of the 6th and 7th of May, 1731, and thereby limited to him in tail male as aforesaid, and also of all other the real estates of testator, and of the purchased estates, and continued in possession thereof until February, 1759, when a commission of lunacy was issued against him, he was declared to be a lunatic, and *Elizabeth Bromfield*, his sister, was appointed committee of his person and estate.

*Elizabeth Bromfield* the younger died the 1st of January, 1790, unmarried and intestate, and without ever having received or been paid the aforesaid two several portions or sums of 1500*l.* and 1500*l.*, leaving the said *John Bromfield* the lunatic, her brother and only next of kin, her surviving.

Soon after the death of said *Elizabeth Bromfield*, the defendant Sir *Henry Oxenden* was appointed committee of the lunatic's real estates, and the said *John Bromfield* continued to be a lunatic until the time of his death, on the 30th January, 1792, intestate, and without issue; leaving the plaintiffs his next of kin; and the plaintiffs, Lord Compton and *Jane Langham*, are now the legal personal representatives of *John Bromfield* and the said *Elizabeth Bromfield*, and, as such, with the other plaintiffs, filed the present bill against Sir *Henry Oxenden* Bart. the heir at law, and the other defendants, to be paid the said two several portions or sums of 1500*l.* and 1500*l.*, and all interest due thereon.

Mr. Attorney General, Mr. Solicitor General, and Mr. Romilly for the plaintiffs.

[\*] The question is, whether the personal representative of *Elizabeth Bromfield* is not entitled to receive those two portions, under the circumstance of the brother having survived her.

There is some difference between the two sums. As to the former, by the recovery, he had become seised in fee of the estate; there being a term, there was no merger at law. As to the second, the estate charged was never conveyed to the uses of the articles; as to this he was tenant in tail in equity. Both sums were demandable by *Elizabeth* in her life-time: upon her death the brother became entitled as her personal representative: but they might have been raised for payment of her debts.

There is no case where unity of title in a lunatic has been held to cause a charge to sink for his heir, though the Court has held it would for the heir of a person of sound mind. In the case of an infant dying, the Court will still hold the charge to subsist for her personal representative. *Thomas v. Kemish*, 2 Vern. 348; where, upon the second point,

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Compton  
v. Oxenden  
Oxenden.

[\*401]

[\*402]

1793.]

Course  
against  
Quakers.

point, the case of a lunatic was argued from. Though it is said, that the Court will not raise an equity between the real and personal representatives; there are many cases in which it could not be argued that he had made no election. If he had made a will before his lunacy, the subsequent unity of possession would not have prevented its having its effect. If he had debts, the Court would have applied the personal interest which he had in the term to the payment of them. In *as, per Grimstone*, Amb. 706., the nature of the property could not be altered: here, when the lunatic died, it was personal property, he had it not as his own; but as personal representative of his sister, subject to all the claims on her: as a lunatic, he could not change the nature of the property, where a person is not capable of election, the Court will consider the property such as is most beneficial. It being a charge on his own estate will make no difference. In *Gwillim v. Holland* (2), 20th of January.

(2) As to this case, see 2 Ves. jun. 263., *et per Sir W. Grant* M. R., 18 Ves. 593, 594. His Honor there observes it to be an unreported case. The Editor is particularly gratified that he has been favoured with a very good note of it amongst *Lord Colchester* in 1853, although one material part of the case is still left unreported. It is as follows:

#### GWILLIM v. HOLLAND.

Devise. —  
Charge. —  
Devise of  
lands made  
chargeable  
with what I  
shall hereafter  
charge upon it.  
A legacy not  
expressly  
charged shall  
be paid out of  
the land.

The testator *Humphrey Mayo* made his will in manner following: —  
As to such worldly estate with which is has pleased God to bless me, I give as hereinafter mentioned, (that is to say), I give all my houses, out-houses, lands, tythes, and estate whatsoever unto my son *Thomas*, paying and discharging what I shall hereafter charge upon it. Item, I give and bequeath unto my four grand-children 200*l.* a-piece, and that interest be paid to them for the same till the whole legacy be discharged and satisfied. And then testator bequeaths several annuities, with liberty to the annuitants to enter and distrain on any part of his lands for non-payment; and then he gives four legacies generally, without charging them on the land; after that a sum of money to the church-wardens of his parish, to be laid out by them in lands for a perpetual charity to the poor, with power till such purchase to enter on his lands for the interest of the said money, and to distrain on non-payment; and makes his son *Thomas* sole executor. *Thomas* the son likewise makes his will, and gives all his land to his brother *William*, subject to the payment of 40*l.* per annum to his sister; and makes him executor, and gives 50*l.* a-piece to his nieces *Ann* and *Mary*. Afterwards *William* makes his will; viz. I give all my lands and tenements to my son *Thomas* and his heirs, subject nevertheless, and chargeable with the payment of all my legacies herein-after mentioned. Item, I give and bequeath to my daughter *Ann* 200*l.* over and above what was given her by the will of her uncle and grandfather; and also to my daughter *Mary* 200*l.* over and above what was given her by her uncle and grandfather's will.

Upon exceptions to the Master's report, question now was, whether the sums of 200*l.* a-piece bequeathed by *Humphrey Mayo* to his four grand-children, (of whom *Ann* and *Mary* were the only two living,) and the 50*l.* bequeathed by *Thomas*, and the legacy of 200*l.* in the will of *William*, were all or either of them charged by the respective wills on the real estate.

Lord Chancellor. — The first point is, whether the legacies of 200*l.* a-piece to the nieces *Ann* and *Mary* were charged respectively by the original wills of *Humphrey* and *Thomas*, and, if not, then,

2d, Whether Mr. *W. Mayo* has by his will made them charges on the real estate. As to the first, what the real design and meaning of *Humphrey* was, is very uncertain, 'tis not impossible that he might mean it as a charge, but as there is nothing of that expressed, nor even to be inferred from the penning of the will, but rather the contrary, a charge which is in disinherison of the heir at law, so far as it goes, cannot be raised but on a possible or doubtful construction. The legacy of 200*l.* is a general bequest of a sum of money, and therefore as such must charge the personal estate, and cannot possibly affect the land; nor is it any answer to say, the personal estate is not expressly charged, and therefore the testator might mean to charge his real, for he has made his son *Thomas* executor, and that was a sufficient disposition of his personal estate without more words, and the executor is compellable to distribute it among the legatees.

But then it is insisted that here are express words to charge the legacies on the land, and those are what immediately preceded these legacies where the testator gives all his estate to *Thomas*, paying and discharging what he should hereafter charge upon it.

But

may be B741, Mrs. Holland was an infant when the estate descended, subject to the charge; but as it was more for her interest to take it as a charge, it was held to be no merger.

9 North Chancellor (without hearing the other side) spoke to the following effect:

12 There is no difference between this case and that in *Ambler*. There  
13 the Court had done the act proper to be done.

§ 218a: I think those words not sufficient for that purpose, being only by way of introduction, and relate to future words of charge, which the testator intended to make use of, and such charge he has afterwards made in proper words with respect to some particular legacies, though not as to others. Thus he gives to the minister of the parish 4*l.* a year, payable for ever out of his land; 40*s.* to his cousin George in like manner. After this he gives some legacies generally, as he did the 300*l.*; some more specifically, as 50*l.* for each of his servants for mourning, &c., which difference is a very material circumstance, to show in what sense the first clause of the will ought to be taken, not by way of immediate charge on all the legacies, but as an introduction to a future one. And it would be a very strange construction that I must make, if it were otherwise, for then I must say that the 50*l.* a piece to the servants and other trifling legacies were charged likewise on the land, as much as this of 300*l.*, which cannot be imagined to have been the meaning of the testator; and upon the whole I think it would be a much more forced interpretation to say, that legacies shall be charged on the real estate, when there are no words for that purpose, than to charge them on the personal estate, which is the natural and ordinary form for payment of such legacies. This point brings to my memory the case of *Leigh v. Lord Warrington*, where the testator begins just in the same manner, as to all his worldly estate, directing all his debts to be paid, and then devised a rent-charge of 100*l.* per annum payable out of his land; and then limited his estate to his brother Henry for life; remainder in trust for his other brother, the Lord Warrington, for life; with remainder over; upon Henry's death the Earl became tenant for life, and brought his bill against the remainder-man to have satisfaction out of the real estate for a debt of 8000*l.* due to him from the testator, being a sum originally devised by the Duchess of Somerset in trust, to be laid out in lands to be settled on the testator in tail, with remainder to the Earl in fee; but no land was ever purchased, and the money came to be the testator as administrator *de bonis non* to the Duchess. I was of counsel in this case, and I remember the Master of the Rolls would not decree a satisfaction out of the real estate, for this reason, (among others,) that notwithstanding the general words at first, yet there was not a sufficient intent appearing by the will to charge the land with debts, because there was an express charge of the rent of 100*l.* per annum, which excluded every thing not expressed. This decree was afterwards reversed in Chancery by Lord King, and his reversal affirmed in the House of Lords, which case seems at first a little similar to the present, but, upon comparing it, it appears very different; for there was no express charge of any particular debts, though there was of the rent-charge; and the giving a bounty legacy to be paid out of the estate could be no exclusion of his intent that the debts should be paid out of it likewise, though it would have excluded any other legacies, and so here.

As to the two legacies of *50*l.** given by *Thomas*, there is no colour for saying those are charges on the real estate; but then it is said, that admitting these two legacies of *200*l.** and of *50*l.** are not charged by the wills of *Humphrey* or *Thomas*, yet they are become so by virtue of the last will of the testator *Wm. Mayo*, who has given his two daughters *2000*l.** a piece, over and above what they were entitled to from him by their uncle and grandfather's will; and it is insisted that this amounts to a devise of his lands, subject to the payment of both his own legacies and those of his father and brother.

But I think that by these words the testator intended plainly to charge only his own legacies.

It is said he had no occasion to mention the other legacies at all, unless he had desired to charge them on his land.

As to that there is a plain answer, he being executor to *Thomas*, who was executor to *William*, and so bound to pay his two brothers' legacies. It might have been a question, whether this devise of 5000*l.* to him and *Mary* might not be taken to be only in fulfilment and satisfaction of the first legacy; and therefore those legacies were mentioned for no other purpose than to shew, as the testator says, that the daughters should have their over and above; and therefore it would be a most strange construction to charge the testator's estate with the legacies of other persons, mentioned only by accident and incidentally.

The exception therefore was over-ruled, but without prejudice to the question relating to the 2000s legacy, stated specially by the Master's report, which came on next to be argued.

17951

Безопасно  
здорово  
Очистка

The charging some particular legacies upon land is a reason to think he only intended these as charges on the land, and not any others which he has not expressly charged on the land.

**Objection.**

**Answer.**

### 2d Question.



1793.

Common-

against R.

Oxman.

[\*408.]

M. 4.

[\*] There is no material difference between the two sums. If an ejectment had been brought, the trust could not have been put into activity without an object; the trustees could not give the trust activity by executing it.

Where there is an union of rights, neither of them can be executed at law; but this Court will preserve them distinct, if the intention so to do is either expressed or implied. (3)

In the case of infants, it goes upon an express intent to keep them separate; as the infant can dispose, at an earlier age, of the personal than of the real estates.

In *Thomas v. Keymish*, the intervening estate prevented the merger. (4)

If my opinion is wrong in this case, it must be so in the former case.

Between an absolute, mere, real, and personal representative, I think no equity can arise.

Dismiss the bill as to both sums.

bs. p.

(3) A MS. note of Sir S. Romilly, in Lord Colchester's collection, thus expresses the part of the judgment: "It is a clear principle of law, and equally so of equity, that where there is a union of rights in the same person, one right cannot be put in exertion against the other." &c. [But see the Editor's note to *Chitty v. Pinder*, post, 412.]

(4) Lord Loughborough is reported, by Mr. Vesey Jun., (2 vol. 364.), to say in this part of the case: "The cases of infants turn upon a supposed intent. The Court say, in *Thomas v. Keymish*, that it was much more beneficial to the infant that it should continue personal, because an infant has the use and disposition of that before 21; but he could have no disposable interest in real till that age. Therefore, in that case, the Court will not hold that a personal right devolving on an infant is merged in a real estate, which he has upon a supposed intention, he would have if he could express it. If there is any express intention. In the manuscript case cited, [*Griffin v. Heald*, note (2) ante,] the intervening incumbrancer prevented the merger; and it was more beneficial for the person entitled to the charge to let the estate stand with the incumbrance upon it, than to take it discharged of the incumbrance, and give it priority to the second incumbrancer. This case goes exactly upon the same ground as the former case upon the timber, [ante, 231.] If this decree is wrong so is that. I take it there is no objection to this proposition, that as between mere and absolute real and personal representatives there can exist no equity; but the interest must be taken as fortune has directed it."

[Vide S. C.  
2 Ves. jun. 265.]  
*Lincoln's Inn  
Hall, 15th July.*

ROEBUCK against DEAN.

(Reg. Lib. 1792. B. fol. 461.)

Testatrix gave 1000*l.* stock to trustees to pay interest to A. for life (her niece) then equally to be divided among the testatrix's brothers and sisters: it vested at the testatrix's death, and the representatives of those who died in the life of the tenant for life, shall take with the survivor. (1)

SUSANNAH LEE made her will the 6th of March, 1792, in the following words, "I give and devise unto John Matthews and Thomas Dean, 1000*l.* in the three per cent. reduced annuities, in trust for the following purpose, to pay the whole of the annual interest of the said annuities, to my niece Elizabeth Redfearn, during her life, and after her decease, my will is, that the said 1000*l.* three per cent. annuities, be equally divided between my dear brother Joshua Lee, and my four dear sisters, Mary Redfearn, Elizabeth Hill, Judith Roebuck, and Ann

(1) See 2 Roper on Legacies, 268. et seq., 2 Ves. jun. 638., 3 Ves. 307. 455. *Wilmot v. Wilmot*, 8 Ves. 10. 12. &c., and the note to the 1 vol. of the Rep. of Jacobs & Walker, 150, 151.

"Senior;

"Senior, all widows, and in like manner to the survivors of, survivor of them." And appointed said *Elizabeth Redfearn* sole executrix. The testatrix died about June, 1786, without revoking or altering her will, and *Elizabeth* [\*] *Redfearn* the executrix, proved the same, and transferred said 1000*l.* unto said *John Mathews* and defendant *Dean*, and the same is now standing in their names. *Elizabeth Hill* died in the testatrix's life-time. *Mathews* and *Dean* paid the dividends to the said *Elizabeth Redfearn*, who afterwards intermarried with *William White*.

*Joshua Lee* the brother, died 28th of February, 1786, in the life-time of said *Elizabeth White*, intestate; administration was granted to the defendant *Mary Lee* his widow.

*Mary Redfearn* died 29th of March, 1786, and in the life-time of said *Elizabeth White*, having, by her will, appointed the defendant *Joshua Redfearn* sole executor, who proved the will.

*Mathews*, one of the trustees, died in December, 1786, leaving defendant *Dean*, him surviving. *Elizabeth White*, (late *Redfearn*), died about December, 1788. The two surviving sisters of the testatrix filed this bill, claiming to be entitled to have the said 1000*l.* three per cent. annuities, together with the dividends and produce thereof since the death of said *Elizabeth Redfearn*, equally divided between them, as being the only two of the persons to whom the same is given by the will of said *Susannah Lee*, who has survived *Elizabeth Redfearn*, (afterwards *White*), and prayed thereby that the said sum of 1000*l.* three per cent. annuities, and the interest thereof, might be declared to belong to, and be directed to be transferred to them in equal moieties.

The defendant *Redfearn* (by his answer) admitted the facts stated in the bill, and that the plaintiffs are the only sisters of the testatrix who survived *Elizabeth Redfearn*; but insisted that said testatrix having by her will, directed that said 1000*l.* should, after the decease of said *Elizabeth Redfearn*, afterwards *White*, be equally divided between her said brother, *Joshua Lee*, and her sister *Mary Redfearn*, (defendant's mother) and *Elizabeth Hill* deceased, and plaintiffs; such 1000*l.* by virtue of the gift or bequest, did, upon the death of said *Elizabeth Redfearn*, afterwards *White*, become devisable among such of said testatrix's sisters and brothers as survived her; and that defendant's mother, said *Mary Redfearn*, having so become entitled to a fourth part of said 1000*l.* it was transmissible to the representatives of said *Mary* [\*] *Redfearn*; and therefore defendant, as her sole executor and residuary legatee, became absolutely entitled thereto, together with the interest thereof from the death of *Elizabeth White*. The defendant *Mary Lee* died after the bill filed; and the suit was revived against the representative of *Joshua Lee*, who answered, and claimed one-fourth part, and interest in right of the said *Joshua Lee*.

Mr. Attorney General, and Mr. Stanley, for the plaintiffs,

The vesting was suspended during the life of *Elizabeth Redfearn*; and then the two plaintiffs having survived her, are entitled. Although the first words, *equally to be divided between them*, would have made the brothers and sisters tenants in common according to the case *Pres. Ch. 164. (Hamel v. Hunt, also in 2 Eq. Abr. 535.)* and *Bindon v. Earl of Suffolk*, 1 P. Wms. 96; the subsequent words, *survivors and survivor*, made them joint-tenants, *Oakley v. Young*, 2 Eq. Abr. 587, and *Barnes v. Allen*, (ante, vol. i. p. 181.) (2) Here the intention was, that the fund should be divided among all the legatees, equally, if they should be alive at the death of the tenant for life, or in case of the death of any of them, then equally among such as should be living at that time.

(2) See the corrections and additions to Mr. Brown's Rep. of *Barnes v. Allen*, from Reg. Lib. ante, 1 vol. 181, 182., and in *Perry v. Woods*, 3 Ves. 208.

1708-

Remains  
apud  
Dumfries  
[ \*404 ]

[ \*405 ]

1793.

Rebecca  
against  
Dunst.

Mr. Mansfield and Mr. King for the defendant, *Joshua Redfearn*; contended that *survivors* meant at the testatrix's own death; that they were to be tenants in common, *Strange v. Philips*, 1 Eq. Abr. 292. therefore, that *Joseph Redfearn* was become entitled to his mother's share.

Mr. Solicitor General for the other defendant, the representative of *Lee*. The tenant for life was the testatrix's niece, the persons to whom the fund was given afterwards, were the brothers and sisters. She could not mean after the death of the niece, *Stones v. Hewitly*, 1 Ves. 165.

Mr. Attorney General (in reply). The niece was residuary legatee; she meant to give her all but the 1000*l.*; and that at her death was to be divided among five persons, or the survivor or survivors of them. *Oakley v. Young* is a strong case in support of this construction.

[\*406]

[\*] Lord Chancellor. — In this case it is manifest the legatees were to take as tenants in common: there is no condition that they shall survive, in order to give them a title. She vests the money in trustees during the life of the niece. I am of opinion the division must be in fourths, two-fourths to the plaintiffs, one-fourth to the representative of *Lee*, and one-fourth to the representative of *Redfearn*.

### GORDON against PITT.

(No Entry.)

[Vide S. C.  
2 Ves. jun. 270.]

Lincoln's Inn  
Hall, 19th July.

Practice as to  
orders for time  
to put in  
further answer,  
after exceptions  
allowed. (1)

IN this case the bill had been filed 6th of November, 1792, and the defendant had had three orders for time to answer; the time expired 2d of February, 1793, and no answer being put in, an attachment issued on the 7th of March; an answer was then put in.

Exceptions were taken to it, and on the 26th of June the Master reported that the exceptions were allowed; on the 27th of June the defendants were served with a *Subpœna* to put in a further answer; the defendants being in contempt for not putting in their further answer, and not having had any further order for time, Mr. Hollist moved on 26th of July last, that the defendants might have a *breve* time to put in the same; when it was ordered, upon paying the costs of their contempt; and on Wednesday the 17th of July being the third seal, (his Honor the Master of the Rolls sitting for Lord Chancellor.)

Mr. Attorney General moved, that this order should be discharged with costs to be taxed; alledging, as the ground of his motion, that the same was irregular and contrary to the practice of the court.

Mr. Hollist maintained, that this was the regular practice of the court, and that a defendant was entitled to the same time to put in a further answer, after exceptions, that he was entitled to for putting in the answer to the original bill, except with respect to the third order, which he understood was never granted in this case, or if it was, depended on the time of year at which it was made.

[\*407]

[\*] His Honor thought this was not the practice; and said the same time never ought to be granted, for putting in a further answer that was allowed for putting in the first, that he believed it had crept into practice,

(1) See the General Order, made on the 23d January following, to correct the practice, *postea*, p. 544., and Mr. Beames's notes upon it, in his valuable edition of the Orders in Chancery, pp. 455, 456.

from its having been moved as matter of course, without stating that it was for putting in a further answer, and therefore that it had passed *sub silentio*; but that he had never admitted it at the Rolls, where it was upon petition, by which means he saw that it was for putting in a further answer, after exceptions allowed; but that if it was the practice, it ought to be altered: and directed the motion to be made, before the Lord Chancellor, and said he would confer with his Lordship upon it.

Accordingly, this day, his Honor came upon the bench, when Lord Chancellor was sitting on rehearings, and Mr. Attorney General, repeating his motion, and insisting that there had been no such practice, for some years back; and saying that upon a third order for time to answer the original bill, the defendant could have but a fortnight, and that it would be an extraordinary practice, that by merely putting in a sham answer, he could obtain so much further time.

Mr. Hollist cited a case of *Bonus and Sherrit*, where, upon a second order, his Lordship had said, that he would consider the practice; but that this was an application to discharge a first order: he said the fault was, that upon the attachment, the plaintiff had taken the costs, and served a *subpoena* for a further answer, by which the defendants were set right in court; when the plaintiff might have gone on upon his former process for contempt: that the attachment was sealed in this case, because the motion for time had not been made so early as the sealing was going on; but that accident, had never been allowed to affect the motion; the order here was correct, and not open to objection.

If any alteration he thought proper in future, it ought not to affect this case.

The Lord Chancellor, doubting much as to the practice,

His Honor said he had enquired into it, and that it certainly had been the practice to obtain as much time for putting in the [\*] further as for the original answer; that this had passed *sub silentio*; and that he hoped there would be some regulation in future; after a first order for putting in a further answer, no further time ought to be granted, but on special ground; for that where the defendant applied for the second order, if he was afterwards taken on an attachment, he had nothing to do, but to put in bail, to answer the next term, and he paid no expence, but the sealing of the attachment.

Lord Chancellor having consulted the Register, said he informed him that in Lord Hardwicke's time after a first order for a month's time to put in the answer; further applications were always grounded on a consent, that a serjeant at arms should go, if the answer was not put in at the expiration of the time.

Mr. Hollist objected to this practice, as it would enable the serjeant at arms, to call upon the Register to draw up the order, without the application of the plaintiff.

The Attorney General's motion was refused; but it was understood, that the practice would be considered, and regulated by an order for that purpose. (2)

(2) It was accordingly corrected about ~~six~~ months afterwards by the order which appears, *postea*, 544. And in Mr. Beames's Orders in Chancery, 455, 456. *Quid vide notex.*

1799.

Continued  
from  
Page.

[ \*408 ]

1798.

[*Vide* S. C.  
*ante*, 3 vol.  
pp. 5. to 7.]

*Lincoln's Inn  
Hall*, 22d July.

Devise of real  
and personal  
estate to trustees  
to pay, &c. to  
testator's wife  
for life, then to  
pay a legacy to  
his daughter;  
this is a vested  
legacy in the  
daughter,  
and trans-  
missible. (1)

[\*409]

### MOLESWORTH *against* MOLESWORTH.

(Reg. Lib. 1792. B. fol. 612.)

THIS case (which is stated, *ante*, vol. iii. p. 5.) came on to be reheard before the present Lord Chancellor.

Mr. *Attorney General*, Mr. *Lloyd*, and Mr. *Alexander*, again argued for the plaintiff that the legacy to *Henrietta Maria Molesworth* was a vested legacy, and was not included in the enumeration of the twenty-four legacies which were to lapse in case of the legatees dying before they should become entitled to their legacies. They cited again *Monkhouse v. Holme*, (*ante*, vol. i. p. 298.) *Dawson v. Killet*, (*ibid.* 119.), and *Benyon v. Maddison*, (*ante*, vol. ii. p. 75.) and contended it was clearly a preference intended to Miss *Monkhouse's* legacy, that it should neither abate nor lapse; that if it was not comprised in the twenty-four legacies, it must be vested.

[\*] Lord Chancellor said it was impossible, by any mode of computation, to include this legacy, among the twenty-four, in case of the lapse of which, the wife was to take the advantage: and that there was no doubt of the general rule being established, by the cases; and therefore (2) decreed an account of the testator's estate.

(1) See the cases above cited and the Editor's notes upon them; 1 *Roper on Legacies* 187, &c.; *Attorney General v. Crispin*, *ante*, 1 vol. 386.; and *Walker v. Main*, 1 *Jacob & Walk.* 1.

(2) Declared that the legacy given, &c., upon the events in the will, vested in the legatee and was transferable to her representative. R. L.

### ATTORNEY GENERAL *against* PARNTHER.

(Reg. Lib. 1792. A. fol. 696. b.)

*Lincoln's Inn  
Hall*, same day.

In an account of  
dividends of the  
wife's separate  
property, directed  
against  
husband's  
estate (1), con-  
sideration  
should be had  
of his extra  
expenses in the  
maintenance,  
in consequence of her being insane. (1)

THIS cause (see vol. iii. p. 441.) came on upon the equity reserved.

Mr. *Solicitor General* prayed a decree for an account against the estate of *John Barker* the husband, of the dividends received of *Francis Barker's* separate property.

Mr. *Mansfield*, on the part of the defendants, desired that in directing an account, consideration might be had of the extraordinary expenses attending the maintenance of Mrs. *Barker*, in consequence of her being insane.

Lord Chancellor ordered the account with such consideration.

(1) See a late case somewhat similar to this, *Brodie v. Barry*, 2 *Ves. & Beam.* 36. When an account is directed of a wife's separate property against her husband he is not liable further back than for one year, *vide ibid.* *Lord Townsend v. Windham*, 2 *Ves.* 1. 4. *Peacock v. Monck*, *ibid.* 190. *Parker v. Whit*, 11 *Ves.* 225., and the other cases in Mr. *Maddocks's* useful note to *Ex parte Elder*, 2 *Madd. Rep.* 286. There are cases to the contrary, which are in favour of the husband; negating any account at all, and *Spain v. Dean*, *ante*, 324. is one of them; but they seem, either to be founded on special circumstances, or to yield in authority to the above general rule. Mr. *Maddocks's* observations, however, at p. 289., seem very just, when he observes, "If the husband is supposed to have applied the separate property in support of the family, why should he be made to account for it at all?"

## MIDDLETON against CATER.

(Reg. Lib. 1792: B. fol. 681. b.)

1793  
 Lincoln's Inn  
 Hall, 23d July

**JOHN CATER**, (a freeman of London) seized of a messuage in *Water Lane, Fleet Street*, in the city of London, and of other real estates, and possessed of considerable personal estate, by will dated 8th December, 1777, (duly attested to pass real estate) gave and bequeathed to two of the defendants all his estates and effects, real and personal, in trust, to lay out on mortgages, and to pay his wife 80*l.* a-year, and for other purposes, and after her death, to make sale thereof; and after divers purposes during the life of his wife; he gave "all the residue, in trust, to the purpose following, (*viz.*) reciting that the hospital called *Jesus Hospital*, at *Bray com. Bucks.* under the direction of the Company of Fishmongers, London, was very scantily provided for, [\*] he directed his executors, in case such residue should amount to 1000*l.* to pay into the hands of the master or senior warden, and the rest of the wardens of the said company, 1000*l.* to be laid out in the purchase of lands, and the rents, issues, and produce arising therefrom, to be for ever applied in augmenting the weekly allowance to the poor of the said Hospital." And if his residue should be larger, he directed a larger proportion to be paid to the said purpose.

The testator died 29th April, 1783, leaving the defendant *Celia Sarah Ann Cater* his heir at law, the defendant *Elizabeth Cater* his widow; and *George Cater* his next of kin.

The bill was filed by the plaintiff, praying that the will might be established, and for the proper accounts, and that the real estate might be sold, and, in case the Court should be of opinion that the bequest to the Fishmongers' Company was not within the Mortmain Act, that the same might be paid.

Two questions were raised, 1st, whether this bequest to the Company was void by the statute of Mortmain: 2d, whether the widow was entitled to dower.

Mr. Attorney General, on behalf of the charity, insisted that the testator being a freeman of London, might devise in Mortmain, notwithstanding the statute. That this custom was recognised, 1 Bro. Abr. 556., which is stated as law, 1 Bacon's Abr. 681., since the statute of Mortmain. And this is considered as a personal privilege, as to property out of the city.

Mr. Mansfield, against the widow's claim of dower, cited Amb. 466. 682. 750.

Lord Chancellor. — As to the 1st point, said, the custom clearly must be confined to lands in the city of London, which *Water Lane* is not; it cannot extend to a will of lands in *Yorkshire*: he declared the gift void.

He held the wife entitled to her dower, and to have the annuity out of the two funds, proportionably; and, as to the residue, that there was a resulting trust for the heir at law, out of so much of the provision for the charity as consisted of real estate, and for the next of kin, as to so much as was personal.

(1) See *Pearson v. Pearson*, ante, 1 vol. 292. with the Editor's notes; especially the reference to *French v. Davies*, 2 Ves. jun. 572. et seq.; *Foster v. Cook*, ante, 3 vol. 247.; *Greaves v. Cary*, 6 Ves. 615.; *Lord Dorchester v. Earl of Epsingham*, Cooper's Ch. Ca. 519., 1 Roper, Bar. & Feme, 555. et seq.

1793.

[\*411]  
[8. C. 2 Ves.  
jun. 1791.]

*Lincoln's Inn  
Hall, 24th July.*

Testatrix  
having given  
real and per-  
sonal estate to  
pay legacies,  
and the per-  
sonalty being  
sufficient to pay  
them, the real  
estate shall not  
be sold for the  
next of kin.

[\*] CHITTY against PARKER and Others.

(Reg. Lib. 1792. A. fol. 590.)

**MARY CHITTY**, being seised in fee-simple of a real estate, and possessed of a considerable personal estate, consisting of leasehold estates, money in the funds, and other articles, made her will, bearing date 31st December, 1762, duly attested to pass real estate, and thereby ordered as follows, "And as to my fortune as I may die possessed of, in freehold estates, life-holding, lease, and copyhold, and all monies in stocks, my desire is, to have it all sold, and turned into money as soon as possibly can be, which I give and devise as follows (but first my will is, that all my just debts be fully satisfied, and burial expences discharged) *Imprimis*, I give" (She then gave several pecuniary legacies, and after them, several specific legacies, among her relations, friends and executors,) and the will then went on "and if I have not given away more than my fortune, my will is, to have several rings given to my friends that I shall mention in a piece of paper inclosed in this my last will."

The piece of paper enclosed, and which bore the same date with the will, begun thus "My desire is, if there shall be more money left than I have given away, I should have rings given to" then several persons were named, and some further directions given.

The testatrix died on the 7th August, 1791, without revoking the will, which, with the paper contained therein, was found in her bureau, by the plaintiff, the executor, who proved the same, the other executor having died in the testatrix's life-time.

The testatrix, living so many years after making her will, and several legatees dying in her life-time, the personal estate became more than sufficient to pay all the legacies, with a very considerable residue; and the next of kin claiming the residue as such, and that the real estate should be converted into personalty for them; and the heir at law contending, on the contrary, that the real estate had descended on her, and ought not to be so converted, it not being necessary for payment of debts: the plaintiff [\*] the executor filed the present bill to have the rights of the parties declared.

Lord Chancellor.

The question is, whether the Court will not order the land to be converted into, and go as money.

If there is a single person who has a right to any part of it, as a gift, as personal estate, that person has a right to call on the Court to convert the fund into money.

But here, there is no such person.

Then, can the next of kin call upon the Court to convert it?

Between the next of kin, and the heir at law, there is no equity. (1)

(1) The position seems warranted as applied to this particular case, which it was in *Compton v. Ozenden*, 2 Ves. jun. 264., *antea*, 403., notes (3) and (4). The generality, however, of Lord Loughborough's position to the same effect, in *Walker v. Deane*, 2 Ves. jun. 176, &c. has been invalidated, upon great consideration, and found inapplicable to various cases upon the question of conversion. See per Lord Eldon C., in *Whitely v. Partridge*, 8 Ves. 235. Sir W. Grant observes, in *Thornton v. Hawley*, 10 Ves. 133., that the law is clear upon the subject, the difficulty being in its application to particular cases, or rather to particular instruments. See also *Biddulph v. Biddulph*, 12 Ves. 161. 165, 166. and the note; and *Kirkman v. Miles*, 13 Ves. 338, 339.

1793.

ATTORNEY GENERAL against HARTLEY.

(Reg. Lib. 1792. A. fol. 573. b.)

Lincoln's Inn  
Hall, 26th July.

**SAMUEL TRAVERS**, Esq., made his will dated 16th of July, 1724, and, thereby, gave several specific and pecuniary legacies, and also gave all the rest and residue of his estate, after payment of debts, &c., his manors, lands, &c., in the county of *Essex*, and elsewhere, with all debts, &c., and his estate both real and personal, to his executors in trust, out of the rents, issues and profits thereof; "to settle an annuity or yearly sum of 60*l.*, to be paid to each and every of seven gentlemen, to be added to the eighteen poor Knights of *Windsor*; the said annuity to be chargeable upon an estate of 500*l.* per annum, to be purchased, and set a-part for that purpose, in the county of *Essex*, by my said executors and trustees, and I humbly pray his majesty, that the seven gentlemen, may be incorporated by charter, with a clause to enable them to purchase, and to hold lands in mortmain, and that a building, the charges thereof to be defrayed out of my personal estate, may be erected or purchased, in or near the castle, for an habitation for the said seven gentlemen, who are to be superannuated or disabled lieutenants of *English* men of war." The testator then went on with directions for the regulation of this [\*] institution, and "as to the rest of his estate, not disposed of as above, he desired might be settled for the maintenance and education of boys at *Christ-church Hospital* in the study and practice of mathematics" and appointed *Walter Carey* and *Samuel Holditch* executors.

The testator died soon after making his will, leaving *Alice Hartley* and *Isabella Travers* his heirs at law: and the executors proved the will in the Prerogative Court of *Canterbury*.

In 1727, a bill was filed in this court, and in 1729, there was a decree at the Rolls, declaring the will well proved; and proper accounts were directed to be taken, and the parties were to lay proposals before the Master, touching the charity given by the testator to the poor Knights of *Windsor*.

The testator's affairs being complicated, several suits were brought; and *Holditch* (who had become the surviving executor) died, after having made his will dated 20th of April, 1763, and thereby reciting, "that he was engaged in the execution of the last will of his uncle *Samuel Travers*, Esq., (the testator) without considering the risk and trouble attending, and though he had taken extraordinary care and pains therein, and yet, lest in the course of so long a transaction, and of such various, intricate and weighty affairs, there should have happened any misapplication and mismanagement therein, and he thought his benefactions to the mathematical school at *Christ's Hospital, London*, the best public gift of all his bequests, and that he doubted his other donations, and the costs of divers long, and expensive suits, in which his estate was engaged, and the annuity claimed by *Carey* the other executor, all which would frustrate his, the said *Samuel Travers*'s intentions, as to the said charity: wherefore, having considered all his relations who wanted his assistance, as far as he thought proper; he, thereby, gave the sum of 8000*l.*, then in his own name in new *South Sea* stock of annuities, to be transferred to the credit of the cause of the Attorney General against *Hartley* and others, with the privity of the Accountant General of the court of Chancery, to be applied to the uses of the last will of the said *Samuel Travers*, by the executors or executor thereof for the time being, pursuant to such directions as the Court

A. (before the stat. of mortmain) gave real and personal estate to a use that would be within the statute, and to other uses which would not be affected by it; B. (after the statute) gave personal estate to the uses of A.'s will: the estate of A. being sufficient for the 1st use, the whole of the second gift shall go to the valid use.

[\*413]



1798.

ATTORNEY  
GENERAL

against

HADDLEY.

[ \*414 ]

[ \*414 ]

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should therein appoint; and he also gave the sum of 2000*l.*, in money to the uses of the said last will of the said Samuel Travers, to be applied pursuant to the directions of the said court of chancery."

[\*] The bill stated that the estate and effects of the testator Travers are more than sufficient to answer the charitable purposes of his will; and, therefore, insisted, that the 8000*l.*, and 2000*l.*, legacies given by the will of Holditch, ought to be applied to the use of the mathematical school at Christ's Hospital only.

Mr. Attorney and Solicitor General, argued that the question was only between the two charities; that there could be no question with the heir at law.

Mr. Mansfield and Mr. Richards, for the residuary legatees, contended, that at the time of the making of Holditch's will, the gift to the poor Knights would not have been valid; but that the estate of Travers, being sufficient for that purpose, put it out of the case.

Lord Chancellor said, that if the testator might be allowed to explain his own meaning, the Court could not in justice apply the legacies to any other charity, than that of Christ's Hospital: a question might have been seriously made, if Travers's estate had not been sufficient for the establishment of the charity for the poor Knights; but when the gift is to two purposes, the one good and the other bad, the Court will never apply it to the use which is bad.

## STREET against ANDERTON.

(No Entry.)

Lincoln's Inn  
Hall, 27th July.

Tenant in  
common in  
possession,  
ordered to give  
security for  
payment of the  
proportion of  
rents to his co-  
tenant; other-  
wise a re-  
ceiver. (1)

[ \*415 ]

MR. Attorney General moved (on behalf of one tenant in common, in equity, against another) for a receiver of two undivided third parts of an estate.

Mr. Richards objected to the motion, first, that it was before the time for answering was out: 2dly, that the person applying, was only entitled to one-third; and that the other tenant in common was entitled to possession, against the trustee, and his co-tenant.

Mr. Attorney insisted the first objection was waived by appearing: with respect to the second, that the trustees could maintain [\*] possession against the co-tenant. Lord Chancellor ordered that the co-tenant should give security to account for one-third of the rents, otherwise the order to go for a receiver.

(1) The Court refuses to grant a receiver of estates, as between tenants in common except in gross cases of exclusion. See *Milbank v. Revett*, 2 Meriv. 405. There are two instances in Mr. Dickins's notes where a receiver was appointed of undivided estates which were most probably cases of an aggravated nature, warranting the interposition. See *Catoert v. Adams*, and *Evelyn v. Evelyn*, 2 Dick. 748. and 800. And the Editor is in possession of a MS. case, taken by himself, where Sir W. Grant M. R., sitting for the Lord Chancellor, 18th Nov. 1802, granted the application for a receiver where the parties, who were brothers and tenants in common, under an agreement made between them to compromise adverse claims, the eldest insisted upon his legal title to the estate as heir at law, and that he ought not to be bound by the agreement, which he said was executed by him in a state of intoxication.

## RAWSTORNE against BENTLEY.

(No Entry.)

**WILLIAM NASSAU ELLIOT**, being, in September, 1764, seized of the piece of ground in the proceedings mentioned, held of the manor of *Highbury*, com. *Middlesex*; in which manor, no lease can be granted of copyhold lands holden thereof, for more than twenty-one years; by indenture of the 28th of that month, demised the same to *Richard Bird*, for twenty-one years, at a rent of 1*l.* per annum, and there was a covenant, contained in that lease, on the part of the lessor, before the end of the term, to renew for a term of twenty-one years, and to renew from the end of such term, for twenty-one, twenty-one, and fifteen years more, (making in the whole, a term of ninety-nine years,) at the said rent of 1*l.* and the lease contained common covenants on the lessee's part to uphold during the term, and yield up the premises at the determination thereof, and with the common remedies, of distress and entry, on default of payment of rent.

By indenture of 4th August, 1770, *Bird* assigned the lease to the plaintiff with all benefit of renewal.

Soon after the execution of this deed, the plaintiff erected a house, &c. on the premises, in the building of which he laid out 700*l.* and upwards, and in 1772, mortgaged the same to *Balthazar Burman* since deceased, for securing 500*l.*

The rent of 1*l.* per annum, was regularly paid till 1779, when the plaintiff went abroad; in November, 1781, the plaintiff became a bankrupt, and *Clever* and *Sheares* were chosen assignees, and 19th of March, 1787, the commission was superseded, and during this time the rent was not paid. In 1784, the lessor died, having by his will appointed *Anthony Chamier* his executor.

In 1785 the first term expired, but no application was made for a renewal.

[\*] In Easter, 1787, *Chamier* brought an ejectment; but he dying soon after, his executors brought a fresh ejectment in *Trinity Term*, and served the same on the tenants in possession, who delivered the same to the plaintiff, (whose bankruptcy was then subsisting) and he delivered

(1) It certainly does appear that the intention of the original parties was, that the tenant should consider himself as having an interest for ninety-nine years; and that the custom of the manor was the only obstacle to that extended term being granted; and it seems equally clear that a reliance on such mutual understanding, and upon the covenant, induced the plaintiff to lay out so large a sum as 1000*l.* on ground theretofore vacant, as is observed upon by the *M. R. postea*, 418. The embarrassed situation of the plaintiff, and the contested commission of bankruptcy, seem also to afford a reasonable account why no application was made in due time, or soon afterwards; and these grounds alone seem capable of supporting the decision. In the *City of London v. Mifford*, 14 Ves. 58; Lord *Eldon* C. says: "I shall not notice the cases farther than by observing that there is a great distinction between this and the cases upon leases for lives; and that where there has been default of this kind in making a request, unless it has been excused by circumstances, there is no authority for decreeing a specific performance; and in one case, *Allen v. Hilton*, 1 Fonb. T. Eq. 432., the want of such request prevented it; admitting that great stress was in that instance laid upon the nature of the subject demised; and if the general rule is, that the request is not of the essence of the contract, the nature of the subject, especially a colliery, might make a difference." See also *Jackson v. Saunders*, 1 Scho. & Lefroy, 443., 2 Dow. 437, &c. As to courts of equity discouraging suits for perpetual renewals, see the Editor's notes upon *Somerville v. Chapman*, ante, 1 vol. 61., and *Trilton v. Foote*, 2 vol. 636, 637., in which latter the principal case is slightly noticed, and which notice ought to be accompanied with the above observations.

1793.

Rawstorne  
against  
Bentley.

the same to the agent for the mortgagee, who entered into a treaty with the agent for the lessor of the plaintiff for a renewal, but which treaty was not carried into execution; and in *Michaelmas* Term following, the agent for the lessor of the plaintiff signed judgment in the ejectment, and sued out a writ of possession, and entered into the receipt of the rents of the premises.

In November, 1788, the plaintiff applied to the agent of the lessor of plaintiff at law, for an account of the arrears of rent, and other costs and charges he had been put to, and, upon payment, for a renewal of the lease; but he objected that the plaintiff was neither legally or equitably entitled to such renewal, and refused, on the part of *William Elliot* the devisee of the lessor, to grant him such renewal.

Upon *William Elliot's* attaining his age of twenty-one, he was admitted to the copyhold, and sold the same to *William Bentley*, and it was by him devised, by will, to the present defendants.

The plaintiff paid off the mortgage, and applied to the defendants for a renewal of the lease; and, upon their refusal, filed the present bill, stating as above, and charging that the defendants pretended the action of ejectment was brought, and judgment obtained under the act of the 4 Geo. 2. stating the clause therein contained, which, as it was not relied upon in his Honor's judgment, it is not necessary to repeat here.

The defendants, by their answer, admitted the facts stated in the bill, and particularly the service of the notice in the ejectment to the tenants in possession, and that no affidavit was made on signing judgment, which they insisted was not necessary under the act of parliament; and submitted whether they were compellable to grant a renewed lease; and that, if so, it should be upon payment for improvements and repairs made on the premises.

This day his Honor pronounced judgment.

[ \*417 ]

[\*] *Master of the Rolls.*

This is a bill for a renewal of a lease granted by a person under whom the defendants claim. (His Honor stated the case, and with respect to the ejectment being under the act of parliament, observed, that no steps were taken under that act, that it was a common declaration in ejectment, and no notice appeared to have been given to the plaintiff) and it prays it on the terms of putting the defendants into the same situation, as if it had been granted at the end of the first term. The defence is great delay on the part of the plaintiff. But I think, under the circumstances of this case, the plaintiff is entitled to a renewal.

The cases in *Ireland* all depended on the circumstance of their being fines payable at certain times. They are mentioned in *Vernon and Scriven's Reports*; it was held in *Ireland*, that if the lessee would pay the fine, and interest for it from the time it had become due, the Court would indulge him with a renewal.

The cases in the House of Lords here, differed from the judgment of the Courts in *Ireland*. They are *Vipon v. Rowley*, Dom. Proc. 1774; *Kam v. Hamilton*, 1776; *Bateman v. Murray*, 1779. The determination of the last case, produced an act of parliament in *Ireland*. † To the principle of that case, I agree; for Lord *Lifford* said it was determined upon a local equity.

The question is, whether this is at all analogous to those cases.

I agree with Lord *Thurlow*, in the opinion he gave in the House of Lords, in *Bateman v. Murray*. He said, "courts of equity will relieve

† See an history of these decisions in *Ireland*, in Lord *Lifford's* speech, in the House of Lords there, on the appeal in *Boyle v. Lysaght*, *Vernon and Scriven's Reports*, 155, particularly from p. 142. See also *Magrath v. Lord Muskerry*, *ibid.* 166. See various others in *Ridgw. P. C.* Et vide *Jackson v. Saunders*, 1 Scho. & Lefroy, 443. et seq. Affirmed in Dom. Proc.; 2 Dow. 437., and *Lemmon v. Napier*, 2 Scho. & Lefroy, 682. et seq.

"the lessee, if he has lost his right by fraud of the lessor, or accident on his own part; but will never assist him where he has lost his right by his own gross laches or neglect:" and again "where the lessee has lost his legal right, he must prove some fraud on the part of the lessor, by which he was debarred the exercise of his right: or some accident or misfortune on his own part, which he could not prevent, by means [\*] whereof he was disabled from applying for a renewal at the stated times, according to the terms of his lease." †

Here the lessor covenanted to add a further term, upon an act to be done by the lessee.

It is very different from the case of paying a fine with interest.

I therefore subscribe to the principle of those cases.

*But this is, in effect, an original lease for 99 years; it provides only for the payment of 1l. a-year during the first twenty-one years, and the succeeding terms.*

*Then, in 1787, the man being under difficulties, an ejectment is brought, on the mere non-payment of the 1l. a-year, but it does not appear that there was not a sufficient distress on the premises.*

*The ground, at first, was vacant ground; and the plaintiff had laid out 1000l. upon it.*

No pains were taken to give him notice of the ejectment.

The mortgagee endeavoured to stop the suit, by a treaty for a new lease; but that was refused; and the ejectment was proceeded on.

It seems to have been merely an ejectment on a lease expired at law.

This being so, what is the meaning of the case? All the lessor stipulated for, was the payment of 1l. a-year.

In order to refuse relief, there must be neglect on the part of the lessee, or a prejudice on the part of the lessor: but the lessors here do not pretend that there was not a sufficient distress on the premises, or that they could not have their rent.

*The lease was intended to be for 99 years; the only reason it was not so, was, because it would not be legal under the custom.*

[\*] No time was limited, by the lease, for the payment of rent.

*The lessor's covenant being that he would always grant further terms, the lessor might think himself not obliged to ask for renewals. (2)*

There was some degree of negligence, on the part of the lessee, if he was apprized of the ejectment, as the mortgagee was; and now he comes for a favour, which he cannot have, but upon payment of costs: if he had applied in time, I would not have given the lessor his costs. *It being, in equity, a lease for ninety-nine years, the plaintiff is punished sufficiently by being obliged to come here for the renewal, which he should have had without.*

This is not shaking the cases in the House of Lords at all.

Therefore, on payment of costs at law, and here, the plaintiff must have a renewal.

The present lessor, not only is not the original lessor; but he was applied to for the renewal, and refused; and a year after, purchased the estate.

Referred to the Master to tax costs at law, [and in this Court], and to take an account of the arrears of rent, and the money laid out in building and improvements, together with interest; and on payment of the same, and of costs, the defendants must execute a lease for twenty-one years from 1775, with the same covenants.

His Honor read these passages from a MS. note of the case of *Bateman v. Murray*, in the House of Lords.

(2) This, however, could hardly be said under the terms of the engagement to renew "before the end of the term."

1798.

Reverend  
against  
Barrister

[\*418]

[\*419]

1793.

*Lincoln's Inn,  
Hall, 2d and  
3d August.*

Exoneration of  
real by personal  
estate. (1)

## FOLEY against PERCIVAL.†

(Reg. Lib. 1792. A. fol. 561.)

[\*420]

**MATTHEW DEERE**, by his will, created a term of 500 years, for the purpose of paying all his debts of what nature or kind soever; and subject to the term, his real estates descended to *Matthew Deere Percival* and *Margery Deere*, as his co-heirs at law. *Ann Bassett*, being a creditor of *Matthew Deere*, after his death, demanded her debt; and *Matthew Deere Percival* and *Margery Deere*, upon a liquidation of her debt, gave their bond [\*] for the payment of it. *Margery Deere*, afterwards, made her will, by which she devised all that her moiety of the lands, &c., which she had taken by descent, as heir at law to *Matthew Deere*, subject to the incumbrances affecting the same, to trustees, upon trust to sell the same, and out of the produce to pay certain sums of money to *A. B.* and *C.*, and in such will, was a proviso, that if such produce should be insufficient to pay such sums of money, the persons to whom they were given were to abate in proportion; but she gave all her goods, chattels and personal estate whatsoever, subject to the debts and legacies, to *Posthuma Deere*. *Margery Deere*, after making her will, together with her co-heir *Matthew Deere Percival*, contracted to sell certain parts of their estate which had descended from *Matthew Deere*, and before the purchase was completed, she died. *Posthuma Deere* died in the life-time of the testatrix. After the death of *Margery Deere*, *Ann Bassett* the creditor, filed her bill against the proper parties, for the purpose of having her debt paid. Upon the first hearing of the cause, it was decreed that the debt due to *Bassett* was to be paid out of the real estate of *Matthew Deere*; and that, as between the heir and personal representative of *Margery Deere*, her personal estate should not exonerate her real estate. Afterwards, upon further directions, the contracts entered into for sale of *Matthew Deere's* estate were directed to be carried into execution, and it was declared, that one moiety of the money arising from the sale belonged to *Matthew Deere Percival*, the other moiety to the personal estate of *Margery Deere*, subject to his debts; and as it was suggested, subject to the legacies charged by *Margery Deere's* will, upon the moiety of the real estate descended upon her: and the real estate of *Matthew Deere* remaining unsold, was directed to be sold, and the money arising by such sale, to be applied to pay the creditor *Bassett*, and if that fund should be deficient, to be paid out of the produce of the estate contracted to be sold in *Margery Deere's* life-time. *Bassett* the creditor having died, the suit was revived by her representative, *Foley*. The estate directed to be sold, produced sufficient to pay the debt; but very little remained to pay the sums charged upon it by the will of *Margery Deere*.

[\*421]

Mr. Campbell on the part of *Jane Mackerath*, one of the next of kin, and Mr. Abbot for *Matthew Deere Percival*, in the same interest, contended that the produce of the real estate, contracted [\*] by *Margery Deere*, to be sold, was personal estate; and that her personal estate was, in no event, to be applied to pay the sums charged upon the real estate by *Margery Deere's* will, but that these sums were specific incum-

† For this case, in a former stage, see Mr. Cox's note on 2 P. Wms. 664.

(1) See *Hamilton v. Worley*, *antea*, 199., and the Editor's note referring to *Lawson v. Hudson*, and *D. Ancaster v. Mayer*, *antea*, 1 vol. 58. 454., *E. Tankerville v. Fawcett*, *Tweddell v. Tweddell*, and *Billinghurst v. Walker*, 2 vol. 58. 101. 152. 604, &c.

branches

brances upon the real estate devised by her will; and if that fund failed, the sums must fail also: that such was clearly the intention of the testatrix, in this case; but that, whatever such intention might be, decided cases proved that the real estate alone was to bear the burthen; and that the personal estate was not to be applied in exoneration of it: in support of which position they cited, *Amesbury v. Brown*, 1 Vesey, 482. *Lawson v. Hudson*, (*ante*, vol. i. p. 58.) *Arnald v. Arnald*, (*Ibid.* 401.) *Ward v. Dudley*, (*ante*, vol. ii. p. 316.) the principle of marshalling is always applied to support the testator's intent, *Lutkins v. Leigh*, For. 53; here it would be to counteract it.

Lord Chancellor was of opinion, that the contract to sell did not convert the real estate into personal, to all purposes whatever; and that, in this case, it ought to be held not to be so converted, which would disappoint the testatrix's intention, as to the payment of the sums charged upon the real estate, by *Margery Deere's* will. He also seemed inclined to think, that the personal estate ought, in the present case, to be applied to pay the sums charged on the real estate: and said there was no occasion to vary the direction. (2)

(2) His Lordship declared that the legatee named in the will of *Margery Deere* had a lien as well on her moiety of the money produced from the estates she contracted to sell previous to her death, as on the monies which had arisen from the estates which passed by her will, &c. &c. R. L.

LEGARD against HODGES.

(Reg. Lib. 1792. B. fol. 679.)

THIS cause, which is reported (*ante*, vol. iii. p. 530.) was reheard before the present Chancellor, 19th of June last: the argument was to the same purpose, as before. This day, Lord Chancellor pronounced judgment to the following effect.

The question is, whether the covenant of the defendant *Hodges*, to set a part and appropriate a third part of the rents, &c., was an equitable lien on that estate, the rents of which were so appropriated. I should hesitate to decide, that in every case where the party has a right to institute a suit in equity in relation to the subject matter, such right passed an equitable lien, *Collins v. Plummer*, (1 Wms. 104.) This case stands clear of the question. [\*] *Hodges* has bound himself to appropriate one-third of the estate: at the end of two years, the covenant became a debt. The trustees in the settlement might have sued *Hodges* at law, and recovered damages for non-performance of the covenant. A bill would have been competent in this court; nay necessary: there is no doubt that, on such a bill, the Court would have decreed *Hodges* to perform his covenant; and not left the parties to the necessity of bringing an annual action. A bill would have been necessary for a discovery, in order to ascertain the clear profits. The Court would, in such a case, I think, have appointed a receiver. If such a decree would have been made against *Hodges*, a positive charge would have been established, against the estate: in order to make the deed complete, there must have been such a decree.

The defendants *Turner* and *Johnson* are not purchasers: there was

(1) See the case on the former hearing, *ante*, 3 vol. 530. to 539., and *Poker v. Bowry*, 1 Hall & Beatt. 49. 52. 108.

1793.

FOLEY  
against  
Percival.

[Vide S. C.  
*ante*, 3 vol.  
530. et seq., and  
1 Ves. jun.  
477.]  
*Lincoln's Inn  
Hall*, 6th Aug.

Upon a rehearing decreed that the covenant is a specific lien on the estate. (1)

[\*422]

(184\*)

1793.  
*Johnson  
 against  
 Hodges.*

no consideration. They are not creditors: there is a proviso in the deed, as to sums to be advanced, and to be received; but not as to sums then due. *Johnson* and *Turner* are mere agents of *Hodges*, not trustees. There is no legal estate in them, as to the estates in the *West Indies*. As to the *English* estate, it is a demise to them, for twenty-one years, in case *Hodges* should so long live. The covenant in the marriage settlement is recited in the deed: till 1785, they were to have nothing to do with the crop of the estate. They are not trustees: they are to be paid for their trouble; they are liable to *Hodges's* creditors of any sort: any creditor, might have filed a bill against them, the Court would have ordered them to account.

The defendants insist they are only to account from 1790. Not so. Their title to receive, and Mrs. *Hodges's* title to be paid one-third, commence at the same period. I am of opinion that *Johnson* and *Turner* are to be considered as *Hodges*. I agree with the decree, except as to the introductory part, declaring them trustees, generally. If I consider them as accepting a direct trust, I doubt whether they can determine it. These persons are entitled to commission (2): it is not so as to trustees. Declare that *Hodges* must specifically perform the contract; and that *Johnson* and *Turner*, under the terms of the deed, must account with the plaintiffs. (3)

(2) It was referred to the Master to certify whether any and what allowance ought to be made them for their commission fees, journeys, and other trouble, pursuant to the deed of April, 1784. R. L.

(3) His Lordship reserved the consideration whether the payments made in respect of mortgages or liens were to be allowed *Johnson* and *Turner*, or either of them, in the accounts directed as against the plaintiffs claiming under the settlement, and whether the said mortgages and liens, or any of them, were to have any and what preference to the settlement; and, with the above variations, the decree was affirmed. R. L.

[ 423 ]

[\*] ALEXANDER ANDERSON, THOMAS BUXTON, HENRY HEYNSAN  
 and JOHN MACKENZIE, Assignees of BROUGH MALTBY and  
 GEORGE MALTBY, Bankrupts - - - Plaintiffs.

[Vide S. C.  
 2 Ves. jun. 244.]

against

THOMAS MALTBY - - - Defendant.

*Lincoln's Inn  
 Hall, 6th Aug.*

(Reg. Lib. 1792. A. fol. 693.)

An account of  
 a partnership  
 estate, and of  
 monies paid  
 to one of the  
 partners, during the partnership, and after the dissolution of it, directed, at a distance of four years after  
 such dissolution, under circumstances shewing that the partner retired from a conviction that the partnership was insolvent. (1)

THIS was a bill filed by the plaintiffs, as assignees of *Brough* and  
*George Maltby*, who had been partners with the defendant *Thomas  
 Maltby*, for an account of monies drawn out of the partnership by the  
 defendant,

(1) This was determined upon the ground of fraud. Note the circumstances; and see per Sir T. Plumer V. C., in *Ex parte Peake*, 1 Madd. Rep. 337. Lord Redcliffe's notes refer to the case of *Mr. Birch* as in support of the present decision, and not contrary to it, as mentioned in the argument, 1 Madd. Rep. 353. Lord Redcliffe's note mentions it thus: "*Ex parte Birch*, in the matter of *W. Penier*, a bankrupt, 23d December, 1800." So that it seems not to have been before Lord Eldon (as noticed 1 Madd. Rep. 353.) but before Lord Loughborough C. The doctrine that in the case of solvent partnerships the creditors

defendant, during the time he continued a partner, and also an account of monies received by him from the bankrupts since he retired from the trade; insisting that such payments were fraudulent and void as against the creditors of *Brough and George Maltby*, and that the defendant ought to be decreed to repay them to the plaintiffs as assignees of the bankrupts. The bill likewise prayed an account to be taken of the shares of the said *Brough Maltby*, *Thomas Maltby* (the defendant), and *George Maltby*, in the partnership concern, at the time *Thomas Maltby* withdrew, and the debts then due to the trade. And if it should appear that the partnership was at that time insolvent, then that *Thomas Maltby* might be decreed to pay his proportion of the debts due from the partnership; but if, on the other hand, any part of the share or capital of the said *Thomas Maltby* in the said co-partnership, after payment of the said co-partnership debts, at that time remained, then that the proof of a debt, which the said *Thomas Maltby* had been permitted to make under the said commission, as due to him on account of such capital, might be reduced to such sum as, upon taking the said accounts, should appear to be the share of the said *Thomas Maltby* remaining in the trade at the time of the dissolution of the said co-partnership. The facts of the case, as they appeared upon the pleadings and the evidence, were as follow:

For many years preceding the year 1773, *Brough Maltby*, one of the bankrupts, (and who was the father of the defendant *Thomas*, and the other bankrupt *George*), was in partnership with *John Dyer*, under the firm of *Maltby and Dyer*. The defendant [\*] *Thomas Maltby* had, at various times prior to the month of *June*, 1773, lent money to the partnership of *Maltby and Dyer*, amounting to 6200*l.*, and in that month he was admitted a partner with *Maltby and Dyer*. This new firm continued until *June*, 1774, when *Dyer* quitted the trade, and a new partnership was formed between *Brough Maltby*, *Thomas Maltby*, and *George Maltby*, under the firm of *Brough Maltby and Sons*. No articles of partnership were entered into, and the books used in the partnership of *Maltby and Dyer*, and *Maltby, Dyer*, and *Maltby*, were carried on in the new co-partnership, without any entry denoting its commencement. At the time of forming this new partnership, no additional capital was brought in by either of the parties, but *Brough Maltby* had credit given him in the books, under the title of "*Brough Maltby's capital*" for the stock in trade and outstanding debts due to *Maltby and Dyer*, and which were entered in the books as amounting to 11,796*l.* 2*s.* 9*d.* *Thomas Maltby* had, in the same manner, credit given to him, under the title of "*Thomas Maltby's capital*," for the sum of 6200*l.* being what he had advanced to the partnership of *Maltby and Dyer*. And *George Maltby* had credit given to him, under the title of "*George Maltby's capital*," for the sum of 332*l.* 15*s.* 6*d.*, which was a sum due to him from the co-partnership of *Dyer and Maltby*.

The new partnership of *Brough Maltby and Sons* continued until *April*, 1784, when *Thomas Maltby* finding the partnership in an insolvent state, retired from the concern; but no public notice was given of the dissolution of the partnership, nor any deed of dissolution executed; nor was any settlement made in the books, nor any valuation of the outstanding debts, but the books were continued without alteration; and *Brough Maltby* and *George Maltby* remained in trade until 6th *May*,

creditors have no general lien upon the effects, or claim upon a retired partner, where there has been no fraud, is well expounded by Lord Eldon C., in *Ex parte Ruffin*, 6 Ves. 119, *et seq.*, and various other cases; as *Ex parte Fell*, 10 Ves. 347., *Ex parte Williams*, 11 Ves. 3, &c. &c. And Sir T. Plumer refers to others in his judgment *Ex parte Peake*, 1 Madd. Rep. 357, 358. See also that case throughout from p. 346, and *Ex parte Harris*, *ibid.* 543, *et seq.*

scribes

1788,

1783.

Answer  
against  
Maltby.

[ \*424 ]



1788.

~~Assignee.~~  
~~creditor.~~  
 Maltby.

1788, when they stopped payment; and on the 3d of November, 1788, they became bankrupts; and the plaintiffs were chosen assignees; but so persons who were creditors at the time of *Thomas Maltby's* retiring from the trade appeared to have proved debts under the commission. During the time the partnership of *Brough Maltby*, *Thomas Maltby*, and *George Maltby* continued, *Thomas Maltby* drew out of the co-partnership the sum of 8904*l.* 15*s.* 1*d.*; and after *Thomas Maltby* had retired from the said co-partnership, *Brough Maltby* and *George Maltby* paid *Thomas Maltby* several sums of money, amounting to 9467*l.* 14*s.* 2*d.*

[ \*425 ]

[\*] The plaintiffs insisted that *Thomas Maltby*, as well as *Brough* and *George Maltby*, knew, at the time that *Thomas* retired, that the partnership was insolvent; but, the better to conceal it, no account was taken, and no bad debts written off, that the books were carried on without any alteration, and without any appearance of settlement: that at the time *Thomas Maltby* left the partnership, it was well known that, of the debts due to the partnership, 22,239*l.* were bad debts: that other of the said debts, to the amount of 27,256*l.* 5*s.* 10*d.* were extremely precarious, and most of them have since turned out to be desperate: and that the defendant *Thomas Maltby* well knew the partnership to be insolvent at the time he retired; which he was induced to do, at that time, on account of the death of Mr. *Bentley*, who had above 20,000*l.* in the hands of *Brough Maltby* and *Sons*, which he suffered to remain without interest, and which sum *Thomas Maltby* apprehended the executor of *Bentley* would call in.

At the time of *Thomas Maltby's* retiring from the trade, no account was taken of the situation of the partnership; but the defendant *Thomas Maltby* insisted, that he had a right to draw out his share of the capital without regard to that, because *Brough Maltby* had agreed, both with him and *George Maltby*, to allow them 7*½d.* per cent. upon their respective capitals, free from all risks; and he set up three agreements to that effect, the one dated the 9th of July, 1776, whereby *Brough Maltby* assured to *Thomas Maltby* the sum of 701*l.* 2*s.* 11*d.* for his share of the said trade from June, 1774, to June, 1775; and the sum of 724*l.* 16*s.* 5*½d.* from June, 1775, to June, 1776: another dated the 2d August, 1777, by which *Brough Maltby* assured to *Thomas Maltby* the sum of 755*l.* 8*s.* 7*½d.* free from risk, as an allowance for the profit of the trade from June, 1776, to June, 1777: and by the last agreement, dated the 8th April, 1780, *Brough Maltby* assured to *Thomas Maltby*, free from all risks, from the month of June, 1777, to the month of June, 1780, 7*½d.* per cent. on the defendant's capital, including, in the estimate of such capital, certain bonds which had been executed by *Brough*, *Thomas*, and *George Maltby*, for money borrowed for the trade, and which bonds were then outstanding. The defendant further insisted, that, upon the footing of these agreements, an account had been stated and settled between *Brough Maltby* and him, which ought to conclude the plaintiffs.

[ \*426 ]

[\*] But the plaintiffs insisted that the three agreements were made between *Brough Maltby* and *Thomas*, without *George Maltby* being a party to them, and therefore that they ought not to bind the partnership estate; and that they were made with a knowledge of the insolvency of the co-partnership, and fraudulent against the general creditors; and also that they are void, as giving *Thomas Maltby* an absolute and certain usurious interest upon his capital, under the denomination of profit, he being indemnified against all risk and loss. The plaintiffs likewise objected to the settled account, as being founded upon the agreements, which were themselves fraudulent against the creditors; and also because the account was not settled at the time it bears date. The plaintiffs further pointed out several items which they alleged to

be erroneous, and, amongst others, the two following: viz. 1st. the sum of 300*l.* for a legacy left to the defendant by his grandfather, in the year 1765, and received by *Brough Maltby*, and by him employed in the partnership of *Maltby* and *Dyer*, and concerning which no entry was made in the partnership books until the 10th of February, 1786; 2dly, a charge of 500*l.* as a portion, which it was alleged *Brough Maltby*, in the year 1778, agreed to allow the defendant *Thomas*; but which was never paid, nor was any entry made concerning it in the books, until the 10th February, 1786. The account was also insisted to be erroneous in charging compound interest upon the several items for which *Thomas Maltby* had credit, which mode of calculation makes the account 2521*l.* 16*s.* more in favour of *Thomas Maltby*; that it would have been if only simple interest had been allowed.

The accounts having been adjusted in this manner between *Brough Maltby* and *Thomas*, upon the bankruptcy of *Brough* and *George Maltby*, *Thomas* proved, under the commission, the sum of 3678*l.* 11*s.* 7*d.* as a joint debt, being what remained due to him upon the account settled as before stated.

On the 9th February, 1790, a dividend of 2*s.* in the pound was declared, which the defendant claimed; and the assignees, by the present suit, not only resisted the payment of that dividend, but sought to have the accounts fairly settled, and to recall the payments which they urged to have been made to the defendant *Thomas Maltby*, in fraud of the partnership creditors.

[\*]. This cause was heard, before the Lords Commissioners *Ashurst* and *Wilson*, who resigned the Great Seal without having made a decree, which made it necessary to re-argue it before the Lord Chancellor, who took some days to consider, and then pronounced his decree.

Lord Chancellor. —

The sole question in the cause is, whether the defendant was a real bona fide creditor, at the time of the several payments made to him by the bankrupts *Brough* and *George Maltby*. The rest is mere matter of account, which the plaintiffs might perhaps have had in a petition in bankruptcy, but which they clearly may have in a bill.

*Thomas Maltby* was not entitled to any specific share; but the mode of arranging the interests of the partners, seems to have been, that each should be entitled according to his share of the capital in the trade. The account, as made out in that manner, gives *Thomas Maltby* credit for 6200*l.*, as his share, including, as the answer seems to admit, the 300*l.* legacy, but the defendant insists that the 6200*l.* is exclusive of that sum.

There were no articles of partnership between the parties, no limited period for its duration, no shares assigned. The whole was a family transaction, between the father and his two sons. The business was carried on from 1774, without any settlement of accounts. In 1776, *Brough Maltby* agrees to allow a net sum for profit to *Midsummer*, 1775, and in the like manner for the years 1776 and 1777. It was afterwards agreed, but at what particular period does not appear, that *Brough Maltby* should allow *Thomas* 7*½* *per cent.* on his share of capital in trade, including one-third of the money borrowed, with an indemnification against all payments. In the year 1784, an event happened which very much affected the credit of the house, viz. the death of *Bentley* who had 20,000*l.*, in their hands. The defendant admits that, upon this, he determined to quit the partnership, and that if a proper allowance had been made for bad and precarious debts, the partnership would have appeared to be insolvent, and that he had reason to suspect the solvency of [\*] the house; and that he determined to quit the trade, and secure payment of his capital. *Thomas Maltby* went out of the

1798

A FEEBLE  
MATTER

[ 324 ]

[ \*427 ]

[ \*428 ]

1793.

ANANSON  
against  
MALBY.

partnership with as little ceremony as he came in. There was no account, no estimate of the debts, no deed of dissolution. The change of partnership was solely notified, by leaving out the letter s, making the firm *Malby and Son*, instead of *Malby and Sons*. No entry is made in the partnership books, until *February*, 1786, and then a balance of 9655*l.*, is stated as due to *Thomas*, as the amount of his stock in the former partnership, transferred to the new partnership. Between that time and 1788, *Thomas Malby* received several sums of money. In *May*, 1788, the partnership of *Brough and George Malby* stopped payment, and the bankruptcy happened in *November* following.

There has been an examination of the books, by an accountant; and from the state of the funds upon his deposition, it appears that if the defendant prevails, he will have gained about what the others have lost.

The ground upon which the plaintiff's claim turns, is that there was no real consideration for the payments, but that it was intended to disguise a disposition of money, under colour of a partnership.

The defendant admits that he suspected the house to be insolvent; such suspicions admitted by a person having the means of ascertaining the fact, amounts to something like certain knowledge; upon what principle could such a person honestly retire, and receive payment? One partner can only be indebted to the other for his share, after payment of all the joint debts. But his share, according to the state of the partnership funds, did not exist. It is argued, on the behalf of the defendant, that this was not the common case of a partnership, *Brough Malby* having assumed all the responsibility. That argument for the defendant would have been equally good, for him to have enforced payment. But that could not be, because it could have been demonstrably proved that there was nothing remaining as his share in the partnership. The agreements do not bind *Brough Malby* to pay personally, but they amount to no more than an admission of the extent of the credit to be given to *Thomas Malby*, in the partnership stock. The payment must [\*] have been taken out of the partnership effects, and *pro rata*, in proportion with the two other capitals. The sum carried to account, is subscribed in again to the partnership capital, which would have given him a right to rate higher in the division of what remained, in truth, to be divided, but not a right to a personal claim against the two other partners. Upon these aliquot parts of the augmented capital, they had a right to share what? What remained of the partnership property. The settlement of the accounts proceeds exactly upon this ground. The capital is supposed to be left in the trade, for the benefit of the remaining partners, to be drawn out in such sums as might be convenient.

If all this is fictitious; if instead of a share of the profits, there is nothing to be divided but a share of the loss, the defendant cannot claim against real creditors.

The defendant's counsel have said, this might be tried at law, and therefore ought not to be decided here. It is true the same rule must decide the case here, as in an action; but in this case, I think I am bound to decide it here. There must be an account, and the case requires that examination of books, letters and accounts, which cannot conveniently be had, in the course of a trial at *nisi prius*. I have tried whether I could direct any issue to be tried at law. Whether any balance was due at the time of the dissolution, is the obvious question; but that cannot be tried without an examination of the books, accounts, and of the parties. I do therefore declare that the settlement, of the defendant's capital in the partnership of *Brough Malby and Sons*, at the time of the dissolution thereof, which the defendant admits by his answer, was made up soon after he quitted the partnership, which was 1st *July*, 1784, but which he admits was not entered in the partnership books

[ 429 ]

books till the 10th *July*, 1786, is not binding upon the plaintiffs, the assignees of the bankrupts; and that the defendant *Thomas Malby* could only be considered as a creditor of the bankrupts in respect of the effective balance of the stock of the former partnership, at the time of the dissolution thereof, transferred to the new partnership.

And his Lordship directed the necessary accounts, that the parties should be examined upon interrogatories, and a production of books and papers, and reserved the consideration of costs, and further directions. (2)

(2) This agrees with the Registrar's book.

776.

~~drawn up~~  
against  
Malby.

[\*] Duke of BOLTON against MARY CHARLOTTE WILLIAMS and Others.

[\*480]

(Reg. Lib. 1792. A. fol. 505. and 709. b.)

Lincoln's Inn  
Hall, 10th Aug.

THIS was a petition of *Thomas Hammersly*, praying that two several sums of 875*l.*, and 675*l.*, might be paid, by the Accountant General, to the petitioner, as trustee under an indenture of the 18th of *January*, last, instead of being paid to the defendant *Mary Charlotte Williams*.

Court will retain monies decreed to parties, on the application of persons having claims upon them.

The petition stated the said indenture, by which, reciting that *Mary Charlotte Williams* was indebted to *Anthony Steventon* a party thereto, in 281*l.* 4*s.* 4*d.* upon bond, and in 568*l.* 15*s.* 8*d.* for money lent, and advanced pending the litigation of this cause, the said *Mary Charlotte Williams* sold to the petitioner the sums of 875*l.*, and 675*l.* (being the arrears of the annuities in the pleadings in this cause mentioned) in trust, to pay the said *Anthony Steventon*, the said sum of 850*l.*, with interest for the same, and all costs to be incurred by him, and to pay the residue, if any, to her; and appointed the petitioner her attorney to receive the said arrears.

It stated that, on the 17th *January*, they obtained an order directing the Accountant General to transfer the said two sums to her; which transfer was made, but she did not accept the same, because it was made to her as wife of *John Williams*, and she would not have been able to receive the dividends, or sell the stock, without the consent of her husband, whom the Court had considered, as having no interest, the same being arrears of an annuity granted to her for her sole and separate use and benefit.

The petition further stated, that the defendant had, on the 27th of *July*, caused the Court to be moved, that the said two sums might be transferred to the Accountant General, and that he might sell the same, and pay the produce thereof to her; which motion the petitioner could not oppose, not having notice thereof. It therefore prayed as above stated.

Mr. *Shuter* supported this petition, on the ground of lien upon the arrears now in Court; and that the Court would not suffer [\*] Mrs. *Williams* to take the money out of court, against her own act in making it a security for *Steventon's* debt. He said, in the present case, the petitioner had a right, at least, to have the money detained till the parties could be brought before the Court by a bill. He cited a case of *Style v. Style*, at the Rolls 19th of *February* last, where upon a petition *Ex parte Oliver*, his Honor had made an order, upon a receiver, not to pay over monies in his hands, till further order, in a matter far

[\*491]

1793.  
Duke of  
Exton  
against  
Williams.

short of the present, as it was for annuitants; and also a case of *Butler v. Stratton*, where upon a petition *Ex parte Hall*, at the Rolls, after Trinity Term last, his Honor had ordered a share of a residue, to be detained in court, till further order, on the petition of a person having claims upon it, though the consideration was disputed, and refused to enter into that matter.

Mr. Attorney General opposed the petition. He admitted the principle and practice of the court; but said here was not a proper affidavit of the consideration paid.

But a fuller affidavit being produced,

Lord Chancellor ordered the 850*l.* to be retained by the Accountant General, and the remainder paid to Mrs. Williams. (1)

(1) A further order was made in this matter on the 4th November following. See Reg. Lib. *ubi supra*, fol. 709. b.

[ \*432 ]

## [\*] BANKRUPTCY.

### GENERAL ORDER. (1)

Wednesday, 26th June, 1798.

[As to superseding commissions of bankrupt. (1)]

WHEREAS by the practice which hath obtained for some years past, eight gazettes must have been published after the issuing a commission of bankrupt, before any other person than the attorney who sued out such commission, can procure the same to be superseded for want of prosecution: and whereas, the time so allowed for prosecuting such commissions as are to be executed in the city of London, is found to be unnecessarily long, and the preference which the attorney suing out such commission, obtains in superseding the same, for want of prosecution, and consequently in suing out another commission upon the petition of some other creditor, immediately after such *supersedeas*, hath been likewise found to be prejudicial to the due course of proceeding in the suing out and prosecuting commissions of bankrupt; I DO THEREFORE ORDER, that any commission of bankrupt which shall be sued out from and after the twenty-sixth day of June instant, and to be executed in the city of London, shall be supersedeable (for want of prosecution) at the expiration of fourteen days, and not sooner, after the date thereof; (2) and that any commission of bankrupt which shall be sued out from and after the said twenty-sixth day of June instant, and not to be executed in the city of London, shall be supersedeable for want of prosecution at the expiration of twenty-eight days, and not sooner, after the date thereof. AND I DO FURTHER ORDER, that one day shall elapse after the expiration of the said fourteen or twenty-eight days before any order shall be made for such *Supersedeas*; and that the application which shall in the course of that day be first made by any other attorney or solicitor than the attorney or solicitor at whose instance the supersedeable commission was issued, for a *Supersedeas* of such

(1) As to the construction of this order, see *Ex parte Leicester*. *Ex parte Layton*, 6 Ves. 429. 434. *Ex parte Ellis*, 7 Ves. 135. *Ex parte Freeman*, 1 Ves. and Bea. 54. and 1 Ross Rep. 380.

(2) Not supersedeable, however, until the writ actually issues. Vide *Ex parte Leicester*, 6 Ves. 429. *Ex parte Layton*, *ibid.* 434, &c.

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[ \*433 ]

**34 Geo. 3. 1793.**

(Reg. Lib. 1792. A. fol. 591. b.)

*Lincoln's Inn  
Hall, 30th Oct.*

**Notice for pay-  
ment of a  
mortgage at  
3 o'clock, is  
not forfeited  
where there is  
an attendance  
before  
4 o'clock.**

(1) The order now made was, that he should pay the money between three and four o'clock on a certain day. R. L.

[ \*434 ]

*Lincoln's Inn  
Hall, 1st Nov.*

**Demurrer to a  
discovery of  
tra ting, over-  
ruled. (1)**

(1) See on this case which was affirmed on a rehearing (17th March, 1794) the 3d edit. of Lord Reddell's Treatise, pp. 161, 162., and Willis on Pleading in Eq. 966. and note (a).

(2) See Sir S. Remilly's note of the judgment, *postea*, 458, note (5).

1793.

Chadwick  
against  
Thomson.

intent and meaning of the several statutes of bankrupts, in the way of trade or business, and with a view or design to gain a living thereby; and whether he had not been denied to his creditors, or concealed himself to prevent his being arrested; interrogating to different acts of bankruptcy, and whether a commission had not been issued against him, and whether he was not justly indebted to the petitioning creditor: and the bill stated a great variety of acts of trading as a merchant and underwriter, and a variety of acts of bankruptcy; that a commission had issued in the year 1782, and that the plaintiffs were chosen assignees, and stated various actions brought by them in that character, against several persons, for securities assigned and money paid by the defendant after acts of bankruptcy committed, in which actions they had recovered, and other proceedings in which the validity of the bankruptcy had come in issue and been established, and particularly an action brought by the defendant against the messenger, to try the bankruptcy, which was afterwards *non-prossed*.

The defendant put in a demurrer to so much of the bill as prayed a discovery of the trading and acts of bankruptcy stated in the bill, and insisted that the plaintiffs are not entitled to have from the defendant, nor is he bound to make any answer or discovery which may be made use of by the plaintiffs, for the purpose of establishing any commission of bankruptcy against the defendant, or may tend to criminate himself, or subject him to the bankrupt laws.

Mr. Graham and Mr. Johnson, in support of the demurrer.

The bill states a long detail of facts to shew trading and acts of bankruptcy committed by the defendant, and the question is, whether the defendant can be called upon to discover facts that will establish his own bankruptcy. — The demurrer goes to the trading as well as the bankruptcy. — There is no instance to be found, where a trader has been compelled to discover whether [\*] he was a bankrupt, or had committed any acts of bankruptcy. Not to rely on the old cases where bankruptcy is considered as criminal, though it certainly is so as a lavishment of the property of his creditors, a man cannot be called upon for a discovery of that by which he shall incur any penalty or forfeiture. It is impossible to say that a bankrupt does not incur a penalty, when he is put into the state (except the safety of his person) of an outlaw, and deprived of all the rights of property. The 5 Geo. 2. expressly makes it a fraud.

There are no cases precisely to this point, but the principle has been decided. Thus a widow who holds an estate *durante viduitate*, shall not be compelled to discover a second marriage; or a clergyman having a living of 8*l*. in the king's books, shall not be compelled to discover an acceptance of a second living, *Boteler v. Alington*, 3 Atkyns, 453. A bankrupt forfeits his real estate. (Lord Chancellor said he could not be held to forfeit by paying his debts, he rendered to the creditors only what is their own.) The real estate is not the creditor's, but by the operation of the bankrupt laws. The bankrupt laws give no authority to the commissioners to exercise the power given to them, till the trading and acts of bankruptcy are proved. As to the demurrer going to the trading, this was necessary, as the trading is material to the act of bankruptcy. The trading, though not a crime itself, is part of the fraud, as without it there cannot be a bankruptcy. There never was a case where such a discovery was compelled. Where the bankrupt petitions to supersede the commission, there is no instance of an order that he should be examined on interrogatories, as to the act of bankruptcy; yet there might be some reason for it in that case, as he comes for a favour which would be refused him, except on the terms of his making a full discovery. It is a common thing for a bankrupt to bring an action to try his own bankruptcy;

[ \*435 ]

bankruptcy; but there is no case of a bill filed, in consequence of such action, to examine him as to the act of bankruptcy. There was a late case where your Lordship thought too much pains had been taken to prove an act of bankruptcy; (*Mr. Day's case*, on petition, just before the vacation,) there a short bill would have brought out the fact.

Lord Chancellor over-ruled the demurrer, as extending to the trading as well as the act of bankruptcy, to which it should [\*] have been confined; but said he did not mean it should be understood that the defendant could be asked as to an intention to defraud. (3)

(3) Sir S. Romilly's note of the judgment (in Lord Colchester's MS. collection) is as follows: "Lord Chancellor—You cannot ask a man whether he intended to defraud his creditors, nor whether he has committed an act of bankruptcy: but you may ask whether he traded or not." This decision affirmed on a re-hearing, 17th March, 1794. From Lord Colchester's MSS.

1798.

CHAMBERS  
against  
THOMPSON.

[\*436]

## MASON against GARDINER.

(Reg. Lib. 1792. B. fol. 636.)

[Fide S. C.  
1 Fonbl. T.  
Eq. 25.]

Lincoln's Inn  
Hall, 1st Nov.

**B**ILL filed by the plaintiff as executor of his late father, praying that four bonds entered into by his said late father and *John Graham* to the defendant, might be declared null and void, and might be delivered up to be cancelled. It stated as follows, that *Alexander Symson* and *Walker Robertson*, residing in *Grenada*, being desirous of purchasing a lot of land in *Tobago* belonging to the defendant who resided in *Ireland*, by agents there, treated with him for the purchase; but the defendant removing to *London*, the plaintiff's late father, and the said *John Graham* as the agents of *Symson* and *Robertson*, agreed with the defendant for the same, for the sum of 2520*l.* after a deduction of 114*l.* 15*s.* due to the crown, and it was agreed that 405*l.* 5*s.* should be paid to the defendant on his executing the conveyance, and that the other remaining 2000*l.* should be paid by five yearly installments of 400*l.* each to be secured by the joint and several bonds of plaintiff's late father and the said *John Graham*, and the conveyance should be made to the plaintiff's said late father as a trustee for *Symson* and *Robertson*, which was carried into execution; that the 405*l.* 5*s.* were paid, and the plaintiff's said late father and *John Graham* executed five bonds, dated on or about 14th September, 1770, to the defendant; by the first of these bonds, plaintiff's late father and *John Graham*, bound themselves their heirs, &c. in the penalty of 1120*l.*, for securing the payment of 560*l.* on the 14th September, 1771, which 560*l.* was therein inserted as the first installment of 400*l.* and also one year's interest at the rate of 8 per cent. on 2000*l.* being the whole amount of the five installments, to the day when the bond was to become due: The second bond was in the penal sum of 1056*l.* for securing payment of 528*l.* on the 14th September, 1772, being the second installment, and the interest of the four last installments, from the 14th September, 1771, to which period such interest at 8 per cent., had been included in the former bond: The 3d. 4th. and [\*] 5th bonds were in the like manner, for securing the payment of the several installments, on the 14th September, in the three subsequent years, including the interest at 8 per cent. on each respectively. The bill in-

Demurrer to a cross bill to have an usurious security delivered up, not offering to pay the sum really due, allowed. (1)

[\*437]

(1) See *Scott v. Nesbit*, ante, 2 vol. 641. and the Editor's note; where the distinction is remarked, that, in the general jurisdiction in bankruptcy, assignees are not compellable either to pay the money originally advanced, or to make any offer to do so. See 9 Ves. 84. and 3 Ves. and Beam. 14.



1793.

DEBON  
against  
GARDNER.

sisted that the sum secured by the said bond, being so partly compounded of an interest calculated at the rate of 8 per cent. was thereby rendered usurious and void.

It also stated, that the lauds had been conveyed by plaintiff's late father, to *Symson* and *Robertson*; and the first bond had been paid by the plaintiff's late father, when it became due; the death of the plaintiff's father, and that the plaintiff had become his personal representative; that the four last bonds remained in the possession of the defendant; and that the defendant had filed his bill against the plaintiff as executor of his father, and others, for obtaining payment of the second of such bonds, and prayed as before stated.

To this bill the defendant demurred for want of equity, because the plaintiff had not, by his bill, offered to pay the principal sum for the payment of which said several bonds are alleged to have been executed; although, upon the plaintiff's own showing, such principal sums appear to have been justly owing, and not to have been discharged.

Mr. *Attorney General*, in support of the demurrer, contended that the plaintiff in his bill, should have offered to pay the principal: he cited the case of *Fitzroy v. Gwillim*, 1 Term Rep. B. R. (134.) that a pawner could not bring an action for goods pawned, without tendering the sum really due with legal interest; and said this offer was the only ground upon which the Court could decree payment of the principal money really due; without it, the Court could only dismiss the original bill. He also added, as cause of demurrer, that the bill did not waive penalties, and therefore could not be maintained.

Mr. *Leach*, in support of the bill, contended that it was not necessary to waive penalties, where, from the length of time, there could be none; that here no interest had been paid for sixteen years: that the question here was, whether the plaintiff had not a right to come here, for a discovery of the usurious facts. If a plaintiff had come here originally, to enforce an [\*] usurious transaction, the Court would admit of a cross bill by way of defence. If so, then as to the relief: the relief prayed, is that the defendant may deliver up a bond, which is unconscientious, and of which he can make no use, either here or at law. The Court will decree this, on the principle of preventing circuitous suits. With respect to offering to pay the principal; it is true, a person coming here for equity, must do equity; and therefore if the party originally came here to avoid the usurious contract, he must offer to pay principal and interest really due. But in a cross bill, it is not necessary to give the court jurisdiction: the Court has jurisdiction from the original bill. The rule is laid down in all the books of practice, that in a cross bill it is not necessary to state a ground of equity. The demurrer admits the bond to be usurious. The original bill must be dismissed. Can there be an equity to retain possession of a piece of waste paper, unless there is an offer to pay the principal money?

Mr. *Attorney General* referred to *Scott v. Nisbet*, (*ante*, vol. ii. p. 649.) where Lord *Thurlow* thought, that though a security executed here, for more than legal interest was void, it must stand as a security for money really due with legal interest.

Mr. *Solicitor General*, mentioned *Dewar v. Span*, 3 vol. Term Rep. B. R. 425.

Lord *Chancellor*. — The bill calls upon the defendant to give up the security; it admits the principal due, and therefore ought to offer payment; the defendant has a right to keep the security, whether it is available or not, if he thinks fit. (2)

Demurrer allowed.

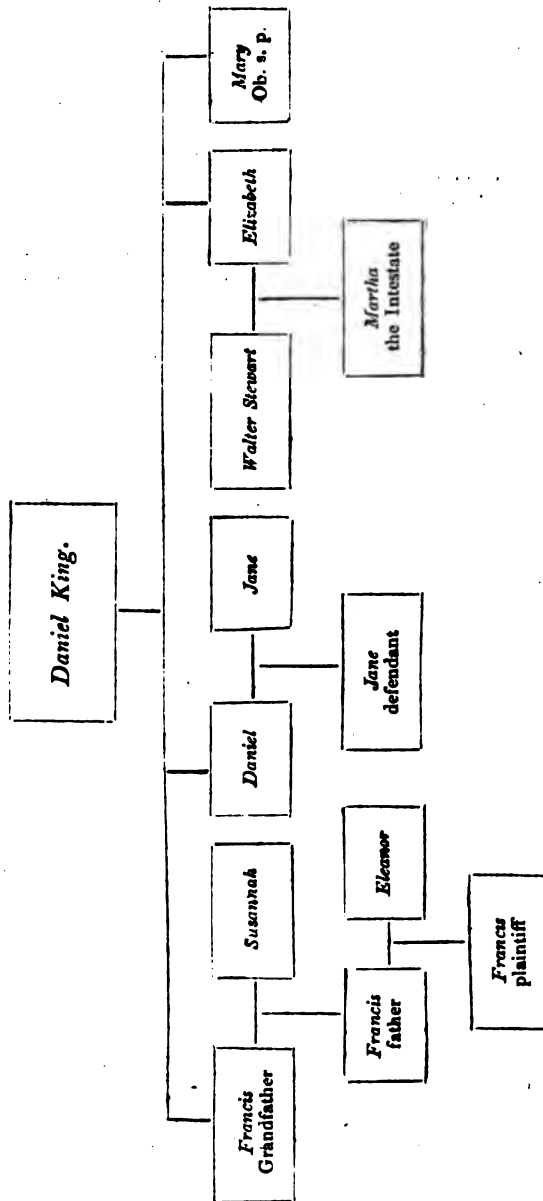
(2) The Lord *Chancellor* added, "The circumstance of its being a cross bill makes no difference." From Sir *J. Romilly's* note in Lord *Colchester's* collection.

## KING against HOLCOMBE.

1793.

*Lincoln's Inn  
Hall, 1st Nov.*

## PEDIGREE.



**T**HE plaintiff by bill, claimed to be next of kin to *Martha Stewart* who died intestate, tracing his relationship from [\*] *Daniel King* Plea that the person through whom the plaintiff claimed died a bachelor and without issue, ordered to stand for an answer, with liberty to except. the [ \*440 ]

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*King*  
*against*  
*Holcombe.*

the common ancestor, by *Francis* his grandfather, through *Francis* plaintiff's father, *Martha Stewart* being descended from the eldest daughter of *Daniel King*.

To this bill, the defendant pleaded that *Francis King* died at *Eltham* in *Kent*, in the year 1691, a bachelor; and, by way of answer, he denied that the said *Francis King* ever had a son named *Francis*, or any other issue whatever. (1)

In support of this plea, it was said that it meets the plaintiff's title, and reduces the whole question to one point, and that such a plea is admissible; that *Lord Thurlow* in *Hall against Noyes*, (*ante*, vol. iii. p. 483. in p. 489.) contradicted his determination in *Newman v. Wallis*, (*ante*, vol. ii. p. 143.): that the Court will not grant an account, whilst the plaintiff's title is doubtful, as it would be immaterial; and, if immaterial, the Court will not grant it. *Sweet v. Young*, Amb. 353.

The plea was ordered to stand for an answer, with liberty to except, but not as to the account.

(1) This answer would seem to over-rule the plea, if it could have been supported otherwise.

[ \*441 ]

[\*] MICHAELMAS TERM,

34 Geo. 3. 1793.

READ [REID] against BOWERS.

(Reg. Lib. 1793. B. fol. 10.)

Motion  
granted, for an  
injunction (1)  
for one partner  
against an-  
other (2); the  
defendant being  
in contempt,  
and served  
personally and not appearing.

IN a suit by one partner against another, Mr. *Scafe* moved for an injunction to restrain the defendant from receiving any more of the partnership funds (1), and for a receiver (2) to be appointed: he stated great abuses, that the defendant was in contempt, and though the notice of motion had been served both upon his solicitor and upon himself personally, he did not appear.

And upon these grounds Lord Chancellor made the order.(3)

(1) Mr. *Brown's* report seems very erroneous as to part of this case. It does not appear that a receiver was even applied for. Reg. Lib.

(2) The Court is very cautious in granting a receiver in partnership concerns. It interferes, in such instances, in gross cases of fraud, exclusion, imminent danger, &c. See *Harding v. Glover*, 18 Ves. 281.

(3) In the principal case the order was for an injunction only. Reg. Lib.

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## LYTTON against LYTTON.

(Reg. Lib. 1793. B. fol. 169. b.)

Nov. 7, 8. 12.

**B**Y articles of agreement, bearing date the 8th March, 1743, between *John Robinson Lytton* Esq. then an infant, and his guardian on the one part, and *Leonora Brereton*, then also an infant, and her mother and guardian on the other part, in consideration of the intended marriage, between *John Robinson Lytton* and *Leonora Brereton*, *John Robinson Lytton* agreed that he would, within one year after he should attain his age of twenty-one, by fine or recovery, settle the estate in question to trustees, to the uses therein mentioned, and *inter al.* after the decease of *John Robinson Lytton*, if *Leonora Brereton* should survive him, as concerning a part of the estate of the yearly value of [\*] 1100*l.* to the use and intent, that she might take an annuity of 700*l.* during the joint lives of herself and her mother, and after the death of her mother, an annuity of 500*l.* during her own life, for her jointure, and, subject thereto, and to a term for 300 years, to the first and other sons of the marriage, in tail, remainder to *John Robinson Lytton*, in fee; and the trusts of the term of 300 years, were declared to be for raising younger children's portions in manner therein-mentioned, and if but one such child, the portion of 10,000*l.* — The marriage took effect.

In the year 1747, *John Robinson Lytton* suffered recoveries of the estates, and declared the uses as follows: "to such uses, intents, and purposes, as the said *John Robinson Lytton*, by any deed or deeds to be by him duly executed in the presence of two or more credible witnesses, or by his last will duly executed in the presence of three or more credible witnesses should declare, limit, and appoint, and in default of appointment, to himself in fee."

*John Robinson Lytton* never executed any deed in execution of this power, except by mortgaging part of the estates, and never settled the estates in pursuance of the articles.

There was issue of the marriage only one daughter, who intermarried with *John White* Esq., and died in 1761, under age, and without issue.

On the 26th January, 1762, *John Robinson Lytton*, being then about 39 years of age, and in a weak state of health, (and his wife being then living, and about 37 years of age,) made his will, and thereby gave to his wife an annuity of 700*l.*, during the joint lives of herself and of *Ann Brereton* her mother, and after the decease of *Ann Brereton*, an annuity of 500*l.* during her life, in satisfaction of the like rents which, by articles on their marriage, were agreed to be settled upon her for her jointure, with such powers as by the said articles were limited, and further charged his estates, in the county of *Hertford*, &c., except *Knebworth*, &c., with payment thereof, and also with the payment of all his just debts, (except such as were charged upon his *Welsh* estate), funeral expences, and such legacies as he should leave by such will, or any codicil thereto, and subject thereto, he [\*] gave and devised, on failure of issue male of his body, his said capital messuage, called *Knebworth Place*, and all his manors, &c., in the counties of *Hertford*, *Essex*,

Though a bill of review (1) cannot, in general, be brought to reverse a decree after 20 years, that bar does not apply to persons having contingent interests, and then not existing, or under disabilities. The testator being married, and in ill health, devised the estates in question, after failure of issue male of his own body (and issue male would have taken under his marriage settlement) to the defendant, (who was his heir at law) for life, with remainders over; Lord Northington declared, that the devise, being after a general failure of issue male, was too remote and void, and that the defendant took as heir at law: that declaration reversed upon a bill of review. (2)

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(1) As to bills of review generally, see Mr. Beames's valuable notes in his edition of the Orders in Chancery, p. 1, &c.

(2) See Fearn's Exec. Dev. 444. et seq., and Cruise Dig. vol. 6. 474. 489, 490, 491. et seq.

and

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and *Bedford*, to *Ellis Young* and *William Lloyd*, and their heirs, &c. in trust, by mortgage or sale of his said manors, &c. (except *Knebworth Place* and its appurtenances), to raise such sums of money as would be sufficient to pay his debts, (except as before,) charges, and legacies as his personal estate should be insufficient to pay; and after payment thereof, to convey so much as should remain unsold, to the use of *Richard Warburton* (now the defendant *Richard Warburton Lytton*), son of his sister *Barbara Warburton*, for life, remainder to the same trustees to preserve contingent remainders, remainder to his first and other sons in tail general, remainder to his first and other daughters in tail, remainder to his own right heirs; with a proviso that the persons in possession should take the name and use the arms of *Lytton*, and should procure an act of parliament for that purpose: and he gave to the said *Richard Warburton*, when in possession, power of jointuring to the amount of 500*l.* a-year, of charging the premises with portions to younger children to the amount of 6000*l.*, and of leasing. — He then gave an annuity of 50*l.* *per annum*, to *Mr. Ellis*, his tutor, or 500*l.*, if he chose to take the same in exchange for the annuity; and gave other annuities and legacies, and made his Wife, *Young*, and *Lloyd* executors.

*April 3d, 1762*, the testator died, leaving *Leonora* his widow, and the defendant *Richard Warburton* an infant his nephew, and his heir at law, and the widow alone proved the will.

In 1763, during the minority of *Richard Warburton Lytton*, and long before his marriage, a bill was filed in this court, in which he, by his next friend, was plaintiff, and the widow, the trustees and *John White*, were defendants, praying *inter al.* that the defendants might deliver up the possession of the estates to *Richard Warburton Lytton*: and the cause came on to be heard, before Lord *Northington*, then Lord *Chancellor*, 26th *July, 1764*; and his Lordship made a decree, by which he declared the testator's will to be well proved, and that the trusts thereof ought to be carried into execution; and further declared, that "the devise to the said *Richard Warburton Lytton*, after a general failure of issue male, was void, the contingency being too remote; and that therefore the said *Richard Warburton Lytton* would take the [\*] premises in question, subject to the charges thereon, as heir at law of the said testator," and his Lordship declared the 10,000*l.*, to be a debt upon the estate, due to said *John White*, in right of his late wife, (the testator's daughter,) and his Lordship directed accounts of funeral expences, debts, legacies, and annuities; and if the personal estate should not be sufficient to pay the same, a sufficient part of the real estate should be sold or mortgaged, to make up the deficiency, and proper directions were given for that purpose.

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*Richard Warburton Lytton* attained his age of twenty-one years in 1766, and was let into possession of the estates, except the *Mansion House* and parts which were in the possession of *Leonora* the widow, and in 1768, he intermarried with *Elizabeth Joddrell* his present wife: previous to that marriage, articles of agreement were entered into, whereby *Richard Warburton Lytton* covenanted to convey to trustees, the estates in question, (subject to the estate for life of *Leonora Lytton*, in part thereof) to the use of himself for life, remainder to trustees to preserve contingent remainders, remainder, as to part thereof, to secure a jointure for his said intended wife, remainder, as to the residue, to trustees for raising portions for younger children, remainder, as to all, to the use of the first and other sons of the marriage in tail male, remainder to *Richard Warburton Lytton*, in fee.

The marriage took effect, and the plaintiff *Elizabeth Barbara Lytton* is the only issue of the marriage.

*Leonora*

*Leonora Lytton*, the widow, died 1790, and defendant took possession of the House and Park at *Knebworth*.

The plaintiff filed her original bill, praying that the devise by *John Robinson Lytton*, by his will, to the trustees, might be declared to be good, and the trusts thereof carried into execution, and that it might be referred to the Master to take proper accounts.

This cause coming on before Lord *Thurlow* Chancellor, 24th January, 1792, the principal question was then fully argued, but his Lordship considering himself bound by Lord *Northington's* decree declined giving any opinion upon it; and it stood over, to consider whether a bill of review might not be filed: it came on again 1st March, 1792, when it was ordered, by consent, that the [\*] plaintiff should be at liberty to amend her bill so as to make it in effect a bill of review, with liberty to the defendants to plead to, or answer it as they might be advised.

The bill was accordingly amended by charging manifest error in the decree, and that under the will of *John Robinson Lytton*, the plaintiff is entitled as tenant in tail general in equity, to the several manors and other hereditaments by the said will devised, subject to the estate for life of the said *Richard Warburton Lytton* her father, and the contingent remainders to his first and other sons in tail general, and to the charges thereon by the marriage articles of 15th April, 1768, and prayed that so much of the decree as she was aggrieved by, and of which she complained by her said bill, might be reviewed and reversed.

The defendant *Richard Warburton Lytton*, by his answer to the original bill, admitted the will, decree, and articles upon his own marriage, and stated that he had paid off several debts of the said testator, and had taken assignments of some of them, and not of others, to trustees for himself, and submitted to the judgment of the Court what interest he took under the several deeds, and the decree; admitting that the said decree was made several years before the plaintiff was born, and therefore that she was not bound thereby: and claimed, in case the Court should be of opinion, that the devise to him was good, to be entitled to be repaid, out of the estate, the debts, &c., he had so paid. By his answer to the amended bill, he stated that the said decree was pronounced, 26th July, 1764, and was afterwards duly entered and enrolled, and that upwards of twenty years have elapsed since the time of pronouncing the said decree, and the entry and enrollment thereof; and therefore submitted whether the plaintiff was not bound and concluded by the said decree, and the enrollment thereof; and that there was no error on the face of the said decree, and that the plaintiff was not aggrieved thereby, and insisted on the said decree, the enrollment thereof, and the lapse of time of upwards of twenty years, in bar to the amended bill, and the relief prayed thereby.

The others were only formal answers, submitting the interests of the several defendants to the judgment of the Court.

[\*] The cause came on at *Lincoln's-Inn Hall*, before the present Lord Chancellor, on the 15th July last, and was then argued by Mr. Attorney General, Mr. Graham and Mr. Richards, for the plaintiff, but it then stood over till the present term, when

Mr. Attorney General, Mr. Graham, Mr. Richards and Mr. Alexander, argued for the plaintiff to the following purpose.

The plaintiff insists that the decree of Lord *Northington* is erroneous, and that she is not barred by it. This is not within the cases that have determined, that after twenty years, a decree shall not be reversed by bill of review. *Edwards v. Carrol*, 5 Bro. Par. Ca. 466. *Smith v. Clay*, Amb. 645. (*ante*, vol. iii. p. 639. n.): the parties in those cases, were not under disabilities. But there has been no case where the rule has been extended to infants. *Jenner v. Tracy*, and *Belch v. Harrey*, 3 P. Wms.

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287. n., shew that length of time will not bar persons under disabilities. Here the plaintiff did not exist at the time of the decree: it would be a monstrous proposition, to suppose her bound by it. The bar from length of time is not established by any positive law, but only upon principles of policy and convenience. This Court proceeds upon an analogy to the statutes of Limitation, which do not apply to infants, or persons under disabilities, till after the disability is removed.

Then the question is, what the testator meant by the words *in failure of issue male of his body*: and this is clear from every clause in the will. He certainly meant in failure of issue *by his then wife*, not a general failure of issue, and unless it can be made out that he meant a general failure of issue, the devise is not too remote; where the intention of the testator is limited to a failure of issue by a wife then alive, that intention has been effectuated, *Jones v. Morgan*, Fearn, 929. (3d edition) *Wellington v. Wellington*, 1 Blackstone's Rep. 645. 4 Burr. 2165. (where it is particularly said of the decree in this case, that "it was not a determination, upon contest and argument,") *French v. Caddel*, 6 Bro. P. C. 58. This was intended as a present, not an executory devise, it was to take place immediately on his decease if he did not leave issue male of his body living at that time. At the time of making his will, he was in a weak state of health, he had a wife in good health and younger than himself. He could not possibly have [\*] any other issue male in contemplation than issue by her; he makes a provision for her, and appoints her executrix. He meant to act upon the interest that he had under the marriage articles, which provided for issue male of that marriage, and which issue male he could not defeat by his will. Even supposing he had an idea of issue male by a future marriage, that issue would take estates tail by implication, which would support the devise over; but the true construction of the will is, if he should not leave issue male by his *then* marriage living at the time of his death, which is the general sense of failure of issue, and is not too remote.

Mr. Solicitor General, Mr. Mansfield, and Mr. Stanley for the defendant.

The present cause is of great importance, because this Court acts differently upon the property of infants, and other persons under disabilities, from the courts of law; such persons are bound *here* by acts done whilst they were under such disabilities at law: *there* when the disabilities cease, they are capable of acting notwithstanding judgments given during their disability. *Here* an infant is bound by accounts taken during his infancy. At law, if tenant for life levy a fine, and the trustees for preserving contingent remainders do not enter, the infant is not bound when the estate for life is exhausted. But there is no case where this Court has overturned a decree pronounced twenty years before, because a party has become interested who was not then in existence. It is true, there is no instance to be produced to the contrary: but the gentlemen on the other side have shewn none, that an infant so circumstanced can proceed after twenty years. This was not one of those cases, where an infant has a day to shew cause. The decree is binding on the infant. It has been determined, that, after twenty years, there cannot be a bill of review, and that the time runs from the decree pronounced, *Smith v. Clay*, (ante, vol. iii. p. 638, n.) It has been said from the case of *Wellington v. Wellington*, that "this decree was not on an argument," but it appears by a note of it, taken by Master Ord, that this was not the case. The note is as follows, "*Warburton v. Lytton*. The only question upon which a doubt in this case arose, was whether the plaintiff, under the will, would take a tenancy [\*] for life, with remainder to his first and other sons in tail male, or whether the devise was void, and he was to take in fee, as heir at law to the testator.

"The

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" The case was, *John Robinson Lytton*, after some devise, and subjecting all his estates to payment of his debts and legacies, gave the remainder (in failure of his own issue male) to trustees, to the use of the plaintiff for life, and then to his first and other sons in tail male, remainder to his first and other daughters in like manner.

" Lord *Northington*, I am of opinion that the devise over to the trustees is void, for being only in failure of his issue male, it is too remote, and falls within the case of *Lady Lanesborough v. Fox*, and is therefore void; and the plaintiff must take the estate as heir at law. Decreed accordingly."

The objection to this decree remaining in force, was not first made by the defendant, but Lord *Thurlow* thought that he could not act upon it till this decree was removed; and, therefore, this bill, originally filed for other purposes, was turned into a bill of review. The inconveniences of removing this decree will be immense. Mr. *Lytton* was taught by it that he was tenant in fee, subject to the incumbrances; he has exercised acts of ownership upon the estate, for which he must, if he is not tenant in fee, be accountable to his daughter; and this after a lapse of 29 years; but if it is her right, she must have it, although the rule certainly has hitherto been, that, after twenty years, a decree has been held to be conclusive; as it is absolutely necessary, in many cases, that the Court should act notwithstanding contingent rights, which was exactly the case here; and it has been thought sufficient to bring the parties, having real existing interests, before the Court. (Lord *Chancellor*, I cannot unravel acts done under an old decree. But the Court cannot fix a limitation to suits, that is a legislative act: and the Court can only adopt the rule of law. The general rule is, that equitable interests are bound by the same limitations, as legal interests.) Then, if the decree is liable to be re-examined, we contend that it is right. It is unquestionable, that a devise "in failure of issue male of the testator," is too remote. Devises are circumscribed by bounds; and if the testator [\*] make a devise, which the law will not permit, his intent is defeated. This is unquestionably the case where he gives upon failure of issue male of his own body, *Lady Lanesborough v. Fox*, *Forrester*, 262.

There is nothing in the present case to qualify the words, or to show that the testator did not mean an indefinite failure of issue: the charges have been relied on, but they prove no such thing; so as to the annuity to the tutor, and the provision for his wife; but surely he might provide for a wife who might survive him, without excluding the possibility of her dying, and his marrying again; nor does the providing for the appointment to a vacant living during *Richard Warburton Lytton's* minority shew it: all these are as consistent with his idea of having a future wife, and issue by her, as not.

Lord *Thurlow*, when this case was argued before him, and the case of *Morgan v. Jones* cited, thought that case turned upon its special circumstances.

It was contended on the other side, that the devise to *Richard Warburton Lytton* was an immediate devise; and this was maintained upon three different grounds. The very uncertainty introduced by the gentlemen, in this way of arguing the case, is a strong reason to support Lord *Northington's* decree, that the devise is to be construed to be upon an indefinite failure of issue.

The first ground on which the position was maintained was that the words "on failure of issue," were not intended to affect the devise, but only to describe an incumbrance, till the removal of which the devise could not take place; that the estate of *Richard Warburton Lytton*

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*Lytton* was an immediate devise, and failure of issue male, did not mean of all issue male, but issue male by *Eleanora Brereton*.

The second, that it was an immediate devise, but describing an event, failure of issue at the death of the testator.

Thirdly, It was admitted, the event was a general failure of issue; but that it was an immediate devise of an estate-tail, to [\*] the testator's own issue, and the devise to *Richard Warburton Lytton* was a remainder.

That learned men can contend any proposition on three such incompatible grounds, affords a strong reason for abiding by the clear sense of the words of the devise. This degree of congruity is at least necessary, that persons who have to determine the question, may form one opinion upon it.

On the first construction, that the words are intended to describe a certain incumbrance on the estate, *Jones v. Morgan* has been cited. That certainly was a peculiar case. There, the estate was settled by the marriage settlement upon the sons of the marriage; there were two sons of the marriage living. The testator took notice of the settlement, and did nothing in contravention of it. He disposed of lands which he had purchased; and if his sons should die without issue, then he gave and devised the remainder. So that he adverted to its being an interest in remainder of which he was disposing. He then proceeded to limit estates to the first and other sons of *Thomas Morgan*, and appointed his wife guardian of the children till they should attain twenty-one. The question there was, whether the devise to *Thomas Morgan* was not void, as a devise over after failure of issue male; the judges of the King's Bench were of opinion, on a case sent from the Court of Chancery, that the issue of a second marriage was not in the testator's view, and that it was a remainder after an estate tail. The Lord Chancellor was of opinion with the judges, that a second marriage was not in view; but as to the estate tail, he thought himself bound by the case of *Laneborough v. Fox*. It was affirmed in the House of Lords, on the ground taken by the Lord Chancellor, that it meant issue by the present wife. The only ground upon which that case can be supported, is, that it was an executory devise, subject to the event of the testator having issue by his then wife. It would have been of great importance in that case if Sir *William Morgan* had married a second wife, and had a son.

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The effect of the words of one will, when carried into another, must be taken with all their consequences; this would be a sufficient reason for holding *Jones v. Morgan* no authority but [\*] where the particular case applies. All the devises there are expressly such as to shew that the testator was disposing, subject to the incumbrance of having two sons who must take. In that case too, he made the wife guardian of the children, which was inconsistent with his providing for the issue of a second marriage.

In the present case, the will is far from being consistent with the marriage articles. With respect to the wife, she was, by the articles, to take in different events, 500*l.* and 700*l.* a-year for life. By the will, he gave her *Nebworth* for life, in satisfaction of, not in conformity to, the articles. He gave her the use of his house and park, in case she chose to reside there, which he could not do as against his issue by her; therefore he did not mean to give it subject to the incumbrance, but in satisfaction of the incumbrance: and by "issue male" he must have meant, "issue male of a future marriage," rather than of that marriage: the words import a probability that *Richard Warburton Lytton* might not come into possession, therefore the gift to him was not immediate. The devise is so repugnant to the articles, that it is impossible to say he meant it subject to the incumbrance created

By

by them. We submit, therefore, that the intent of the testator, in this devise, is clear and plain.

Suppose there had been issue male by *Eleonora Brereton* born after the will, and the testator had then died, such issue male would have been entitled to an estate tail, subject to the 700*l.* a-year. The question would have been, whether the testator would have been bound by the articles.

Suppose he had had issue male by a second marriage, it is contended it would have been a revocation of the will: but it could not be so as to the charge of debts and legacies.

The will is intelligible throughout, if he thought himself not bound by the articles: but it is inconsistent, if to be taken subject to the articles.

This is a case in which, whatever may be the inclination of the Court to confine it to issue by *Eleonora Brereton*, the Court cannot so confine it. If there is not sufficient in the will to give it that construction, there is not enough to contradict the express [\*] words. The rule of law is, that the natural sense of the words must prevail.

It is equally a future devise, whether he means issue by the present or a future marriage.

The second ground admits that the devise does not mean subject to an incumbrance, but that it is upon an event—the failure of issue male. The case of *Wellington v. Wellington* (4 Burrow. 2165.) was argued, at least, on this ground, that there is a distinction between “default of issue” and “on failure of issue;” that the latter supposes that issue will exist, the other does not, and was consistent with there never being issue, as well as the issue dying in his life-time. The case might be decided without that distinction. It might be of great importance; for if “on default” does not mean the same as “in failure,” many cases could not be supported. Mr. *Blackstone* admitted that, if the distinction could not prevail, he could not support the devise after a general failure of issue. There was nothing in that will inconsistent with its being an immediate devise at the death of the testator. But here it is in his contemplation that *Richard Warburton Lytton* might not take. In *French v. Caddel*, 6 Brown’s Plt. Cas. 58., the ground on which it was determined is not clear; there could not be a doubt about the intention, but it would have been difficult to have determined that the devise there was good, without overturning the doctrine of *Lanesborough v. Fox*, and other cases. The ground on which it was argued was, that the words described the event of a general failure of issue. Determinations to the same effect have been made on the words “default of issue,” with respect to personal estate; and it has been uniformly decided, that, unless there were words to tie it up to the time of the testator’s decease, such a gift was too remote. The cases on real and personal estates are collected in *Fearne*.

The third ground on which it is argued admits that the words describe an indefinite failure of issue, but that an estate-tail must be implied to the issue of the testator. In the case of *Lanesborough v. Fox*, all the judges held that Lord *James* did not take an estate-tail by implication. That was a devise of a reversion in fee, of an estate settled on the marriage of *James*, and the words were, “in failure of issue of “the body of the said *James* [\*] *Lane*, and for want of heirs male of “my body, to his daughter.” And in *Jones v. Morgan*, where the same ground was thrown out, in aid of the others, the Lord Chancellor and Judges in the House of Lords thought it would not do. These are cases against an estate-tail being raised by implication. There are no cases of an estate-tail being raised by implication, except where the gift is to the heir at law, or a person who takes in exclusion of the heir

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at law. In *Walter v. Drew*, Com. Rep. 372, the words were, "if my son *William* should happen to die, and leave no issue of his body, then and in that case, and not otherwise, he gave his lands to *Richard* his son." Here the first son *William* was held to take an estate tail by implication, because, otherwise, he would have taken the whole as heir, and therefore that the words would reduce his interest. The operation of the will was not to devise, but to limit the estate; but here the words could not limit the operation of the devise, and therefore could not give an estate tail by implication; there are no words to exclude the heir at law taking generally. It is impossible to make any thing of this argument in this case.

There is nothing in the will from which it is necessarily to be implied that he made the will in contemplation of the articles; therefore the words must have their general sense, and it is at least as probable that he meant a failure of issue by another, as by the present marriage.

The words must have their usual sense, unless they are shewn to be used in some other: and that not being the case, the decree is right, and ought to be affirmed.

Mr. Attorney General, in reply.

I admit that a devise *on failure*, or *in default* of issue male, of the testator, (for I do not mean to take the distinction between the two expressions,) where expressed in these terms generally, will be too remote and void.

On the other hand, it is clear, especially with respect to personal estate, that the Court will lay hold of the slightest circumstance to narrow the general construction of those words: that the Court has not given the same latitude in the case of real estate I must admit, though I cannot account for it.

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[\*] In *Forth v. Chapman* (1 Wms. 663.) different senses were given to the same expressions, with respect to the different species of estate; but from the case of *Porter v. Bradley* (3 Term Rep. 143.) we find that distinction begins to be doubted.

If it appear that the testator, by failure of issue, meant *issue by his present wife*, or *not leaving issue*, or *if his issue should die*, the will must have its effect.

Here it is said that he meant, if he had a son by another wife, that son should take. It is clear that, if he had a daughter, he did not mean that she should take. It is sufficient for my client that (by accident, if you will) he had no son by another wife.

All these cases are considered as cases of hardship; they are, in fact, only cases of surprise upon the testator, which the Court cannot help.

The question in this case is, whether attending to the rules of construction usually applied to discover the intention of testators, the testator has not clearly expressed his intention.

As to the right of the plaintiff to come into Court. — I am ready to admit that, where a devise has been acted under for twenty years, it is a good reason for not opening the question again. With respect to the present decree, I say nothing as to persons under disabilities, as infants, feme coverts, or non-existing. I am not discussing what is the consequence of their coming after their disabilities are removed, because it is unnecessary in this case. In cases where sales have been decreed, and purchasers, &c. would be affected, it may be that, from necessity, such decrees will bind parties, though under disabilities at the time; but where the decree has not been carried into execution, there can be no objection to letting such parties in.

What is there in this decree to shut out the present plaintiff from having the matter again discussed?

Lord

Lord Northington has subjected the estate to payment of debts, funeral expences, and legacies; there is only one purpose for [\*] which the decree was to act upon the estate of *Lytton* the father; and the only difficulty was, as to the conveyance of the estate to him, whether it should be the fee intire, or agreeable to the uses of the will. How does the principle of necessity apply, as between him and his daughter? The cause was never brought on for further directions, and no conveyance has ever been made, therefore the principle of necessity does not apply.

Lord Thurlow was of opinion in the *Selby* cause, that it was difficult to find a principle to bind even a person who was a party to it, as to a part of the decree which was unnecessary as to him. Here the decree has not ordered any thing to be done inconsistent with the claim of the present plaintiff.

Then, to consider what was the meaning of the will.

*Lytton*, the testator, was clearly bound by the articles, though at the time of their execution he was an infant.

In *Drury v. Drury* (3), (5 Bro. Parl. Cases, 570.) it was held that a female infant was bound by a marriage settlement. The same point was held in this court in *Durnford v. Lane*, (*ante*, vol. i. p. 106.) it was a contract which either of them might affirm. In this case, they suffered, after he was of age, a recovery, which was covenanted by the articles to be suffered. Could *Lytton*, the testator, say, that his estate was bound, without binding him? If his estate was not bound by reason of his infancy, her's would not be so on account of her infancy, but he took 3000*l.* part of her estate. Lord Northington, in his decree, thought *Lytton* bound by the articles; he considered the 10,000*l.* as a debt on the estate, which it could not be, unless *Lytton* was bound by the articles; and if he was bound as to the 10,000*l.*, there is no reason why he should not be bound throughout. The Court will not suppose him, when he made the will, forgetful of the obligation. He knew the nature of his right, that he had the estate fully, except subject to issue male by *Elenora Brereton*.

Then he makes a will, which would have the same effect, whether he used the expression made use of here or not; he might suppose his wife would survive him; then by "failure of issue male" he must mean "issue male by her" and he considered [\*] the event of the issue male by her, so little probable, that it would be a present devise upon his death.

Why does he make provisions inconsistent with the articles? Because he took it for granted that issue male would never arise, or that he should not marry again and have issue male. He considered his present situation, only considering his wife as a widow without children. The case that he contemplated has happened, and it is not my business to consider what his intention was in other events.

With respect to the charges, the words, "failure of issue male," must be implied; for he could not give such charges as against his issue: the true construction therefore of the charge of debts and legacies is, I give them as I can give them, that is, in the contingency of having no issue male by that marriage; he has not expressed any intention as to issue by any other marriage.

The difficulty of the other construction would be, that the devise, as to the charges, would be to take place on failure of issue male of the present marriage, but not as a devise, till after a general failure of issue; the provision for the wife is consistent with the articles which had provided for her, 500*l.* a-year, in one event, 700*l.* a-year in another.

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As to the cases, they prove that the words, "failure of issue" may be used in the special sense of "issue by my present wife;" *Jones v. Morgan*, *Wellington v. Wellington*, and *French v. Caddel*, all shew, that if the conscience of the Court is satisfied, that the testator used the words in that sense, it will do what he meant should be done. In *Jones v. Morgan*, the words were strong to shew he meant issue by any other marriage, as well as by the present; but the Court thought that by making the wife guardian, he contemplated her surviving him. The case of *Wellington v. Wellington* is decisive of the present. As to *French v. Caddel*, the argument drawn from it is quite mistaken. As for *Lady Lanesborough v. Fox*, by the settlement there was an estate tail in remainder; by the will there was an estate tail, in failure of issue male of the testator; besides he could not mean to give a life estate after a general failure of issue. That case is neither more nor less than this, that a person having a reversion after [\*] estates settled on the marriage of his son, by giving that reversion, shews he means, after the failure of such issue as the settlement provided for.

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Then it comes to this, that the practice will allow your Lordship, if you are satisfied in your conscience that he meant to give an estate to take place at his death, to adopt that construction.

If, before the cause had come on for further directions, a child had been born, who could take under the will, the Court would have heard that child before it made its decree.

Mr. *Dunning*, in *Wellington v. Wellington*, said, the decree in this case passed without argument, and by the note produced, it does not seem to have been much considered; and when it was on before Lord *Thurlow*, he expressed great doubt.

Lord *Chancellor* said, he thought the case worthy of great consideration, as the defendant had been induced to treat the estate as his own; and, as the daughter was of age, such an arrangement might be made as to render a decree unnecessary: that the testator's unfortunate contemplation of the possibility of future issue stood in the way of every thing.

The cause stood over,

And this day (12th November) the cause stood for judgment.

Lord *Chancellor* (stated the case), and spoke to the following effect.

Immediately after the death of *John Robinson Lytton*, a bill was filed by the present *Richard Warburton Lytton*, by his next friend, claiming as heir at law. — The cause was heard in 1764, and a decree made, by which it was declared that the limitation, being after a general failure of issue, was too remote, and that he took as heir at law. Accounts were directed to be taken, and *White's* charge of 10,000*l.* was decreed to be a charge upon the estate. It appears, that after the decree, the accounts were made up, an inventory of the furniture at *Knebworth* was made [\*] out, and debts were paid; but there was no further application to the Court.

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In 1768, *Richard Warburton Lytton* married, and, by articles, made himself tenant for life, remainder to issue male, but there was no limitation to daughters, and provision was made for the wife. The only issue of that marriage is a daughter, the present plaintiff.

Before she came of age, she filed a bill, which has been turned into a bill of review, praying to reverse the former decree.

The preliminary objection is, that after twenty years from the decree enrolled there can be no bill of review.

I shall not take up much time on this subject, as I am clearly of opinion, that this bar cannot be objected against an infant, or any person under the disabilities specified in the statutes of limitation.

Limitation of suits is not a judicial power, but a legislative one. The rules

rules of limitation are not matter of policy, but of positive law. *Expediit Republicæ ut sit finis litium*, but this is not the business of the judge, for that would be *jus dare* not *jus dicere*.

Lord Guildford says, there was no limitation of time for a bill of review, and this continued the rule during his life.

But afterwards there was an alteration; the Stat. 11 & 12 W. 3. limited the time for writs of error to reverse judgments at law.

A decree of this court is as a judgment at law. Lord Camden in giving judgment in *Smith v. Clay*, (*ante*, vol. iii. p. 639. n.) expressly says, that equitable rights are subject to the same bars as legal rights: and it is so where this rule can apply: but it is not so when against infants, or till five years after they attain their age.

Then there is no objection; the accounts may now be taken just as they might have been at first, under the decree. No third persons are affected, it rests between the father and daughter.

[\*] The next question is, whether Lord Northington's declaration that the devise is too remote, be well founded.

There is no person I more respect than Lord Northington: but this case does not appear to have been determined after that deliberation, which will give it the sanction due to a decree of Lord Northington.

I attended the court at that time, and have no recollection of the case. It seems by the note, to have passed without argument, and solely on the ground of *Lady Lanesborough v. Fox*. The declaration was unnecessary at the time; for every direction that was given might have been so without the declaration; it was not necessary to consider what interest Mr. Lytton took in the estate; the trusts of the will might have been as well executed without it. The question would not arise, until it was considered who were to be parties to the conveyance, *Lady Lanesborough v. Fox*, was considered as governing this case; but when fairly examined, there cannot be a greater dissimilitude.

*Lady Lanesborough v. Fox* is not only right, but the result of it was to affirm the intention of the testator, not to contradict it. That case had a great course of futurity in view.

The applying the same rule to a will which was to take place on the testator's decease, cannot be just.

Compare the circumstances of the present case with that, under the circumstances of the family. Here the testator had had no child for several years, his only child was just dead. The devisee was his next and immediate heir, but he introduces it by the words "in failure of issue male." Could this mean more than to take on the event, which alone prevented the estate from being the subject of an immediate devise? He certainly had the articles in his contemplation. There was no prospect of issue at the time. It was not like Lord *Lanesborough's* case, who had issue, and might have many more.

It would be a harsh construction that *Lytton* (the testator) had here the idea of future issue in contemplation, and an indefinite failure of that issue; he meant to give an immediate [\*] estate in possession at his decease; every clause in the will shews this intention.

The other cases *Jones v. Morgan*; *Wellington v. Wellington*; and *French v. Caddel*, were all cases where taking the words strictly and construing them blindly, without considering the circumstances, would have been upon a general failure of issue, and therefore void.

With respect to *Jones v. Morgan*, I have a very full note of Lord Mansfield's judgment, to which I refer, on account of the clear manner in which he states the ground of decision. He there says "Now it has been truly said, that to construe a will, the intent of the testator is to be taken from the whole will together, applied to the subject matter to which the will relates: if that be agreeable to law it must govern; if

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the intent be clear, but not agreeable to law, it is void and null. If the intent be clear and agreeable to law, no matter what words the testator has made use of, the courts of justice where the questions arise, must adapt and model his clear intent, in such manner as he himself might have done, if he had made use of apt and legal terms. Another thing that has been said, (and it is unfortunate when words happen to be made use of in the determination of causes, without a precise, clear, definite idea annexed to them; for the great disputes of the world arise upon words,) a great dispute has been made, of what is a necessary implication; that a necessary implication must mean, that where there is a natural impossibility that it should be otherwise: there never was such a construction put upon it as a necessary implication. It is that implication which arises upon the words the testator has made use of, that clearly satisfies the court what was his meaning; and that, as put in opposition to a conjecture; you are not to conjecture what would have been the testator's meaning, if he had had the whole case before him, and if he had thought of such an event, what the testator would have said upon it; that is a conjecture: you must find out his meaning, whether expressed or implied, from his words: and if it is an express meaning, and he has made use of inaccurate words, you must construe his words: if they are words of sense or declarations which are no ways accurate in legal phrase, you must see clearly that it is the testator's meaning; and if the [\*] testator's meaning is doubtful, if a court of justice cannot say they are satisfied his intention was so, the whole will be void for uncertainty. Therefore a necessary implication is that which leaves no room to doubt; it is not an implication upon conjecture; you are not to conjecture what he would have done in an event he never thought of; that will not do, and many cases have been determined upon that one. I mentioned the great case of *Coryton v. Hellier* (4), in 1745, determined by Lord *Hardwicke*, where a man by his will, meaning to make a marriage settlement, devises to *A.* and to prevent the entail being barred, by his having no freehold, he devises to *A.* for ninety-nine years, and then goes on to make the settlement, and the drawer omits to say, "for ninety years if he should so long live," the great question there was whether, by implication, the words, "if he should so long live" should be added. It was not a necessary implication; it was not impossible that he meant a term of ninety-nine years: but there Lord *Hardwicke* upon going through all the argument, and upon the nature of the thing, was convinced, and every body else, equal to a demonstration, that the testator meant ninety-nine years, if he should so long live, and not a term of ninety-nine years, and so the case was adjudged." The converse of that case was, a case where this very estate was the subject, *Amhurst v. Lytton*, which was in the House of Lords (5). It is best reported in Fitzgibbon, 99. There was no reason, in that case, why the testator should not give his mother the term of one thousand years; but it was held, it was only his intention to give her the money, and that, further than securing that, the term should attend the inheritance.

It is manifest here, he had no intention of giving an estate after a general failure of issue. The circumstances of the testator and his family have always been taken into consideration in these cases.

Reverse the declaration made by Lord *Northington* (6).

(4) Lately reported, 2 Cox, 340.

(5) 5 Bro. P. C. 254. 8vo ed.

(6) Reg. Lib. 1793. B. fol. 174.

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[\*] JACKSON, Widow, and Others *against* JACKSON and Others.

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(Reg. Lib. 1793. A. fol. 833.)

Rolls, 21st Nov.

**B**Y settlement previous to the marriage of *William* and *Mary Jackson*, (the father and mother of *Matthew Jackson*, the plaintiff's late husband) bearing date 16th and 17th *September*, 1755, certain premises in *Lackenby*, and an undivided third part of the manor of *Brotton*, in *Cleveland*, *Yorkshire*, were conveyed to the use of *William Jackson* for life, remainder to trustees for preserving contingent remainders, remainder, as to part, to trustees to provide a jointure for *Mary*, and, as to other part, for raising portions for younger children, remainder, as to all the premises, to the use of the first and other sons of the marriage in tail general, with remainders over.

The marriage took effect, and there were issue thereof *John Jackson*, who died before *November*, 1787, unmarried and without issue, *Matthew Jackson*, late husband of the plaintiff, and the defendant *William Jackson*.

By indentures of lease and release, 1st and 2d *November*, 1787, *John Preston*, the surviving trustee in the former indenture, *William Jackson* and *Mary* his wife, and *Matthew Jackson* their eldest surviving son, conveyed the premises comprised in the indentures, to a trustee, for making him tenant to the præcipe, in order to the suffering a recovery, the uses of which were to enure, as to the premises in *Lackenby*, to the use of *William Jackson*, the father, in fee, and as to the premises in *Brotton*, to the use of the same trustee for a term of 1000 years, upon the trusts therein declared and subject thereto, to the use of *William Jackson*, the father, for life, remainder to the same trustees to preserve contingent remainders, remainder to the use and intent that *Mary Jackson*, the wife of the said *William*, in case she should survive her said husband, might receive 150*l. per annum* for her life, remainder to *Matthew Jackson* for life, remainder to the same trustees to preserve contingent remainders, remainder to the first and other sons of *Matthew Jackson*, in tail, remainder to his daughters, as tenants in common; remainder to defendant *William Jackson*, &c., in the same manner; remainder to *William Jackson* [\*] the father in fee: and in the same indenture was contained a proviso, enabling the said *Matthew Jackson* and *William Jackson*, when they should respectively be in the actual possession of the premises, by virtue of the limitations therein contained, to grant, settle or appoint the said premises (subject as aforesaid) or any part thereof, to the use of any woman or women they respectively should marry, for and during their life or lives respectively, for her and their jointure or jointures, and in bar of her and their dower." And the said recovery was afterwards duly suffered.

Some time in or after the month of *May*, 1788, the plaintiff *Isabella Darnell* intermarried with the said *Matthew Jackson*, and, by articles under seal duly executed before the marriage, dated 14th *May*, 1788, made between *William Jackson* the father, and *Matthew Jackson*, by the description of the son and heir apparent of the said *William Jackson*, of the first part; the plaintiff *Isabella* (by her then name of *Isabella Darnell*, spinster) of the second part; and the other plaintiffs, the trustees, of the third part; the said *William Jackson* and *Matthew*

Father being tenant for life, and son tenant in tail in remainder, of an estate, a settlement was made, wherein was a power for the son, when in possession, to make a jointure.

Father and son enter into a general covenant (without reciting, or referring to the power) that the son, within twelve months, shall make a jointure on a then intended wife: the father dies within twelve months; the son takes possession and dies, without making any settlement: the estate is bound in the hands of the remainderman. (1)

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(1) See also accordingly *Shannon v. Bradstreet*, 1 Scho. and Lefroy, 52. *et seq.* Lord Redesdale C. refers, *ibid.* p. 63. to the principal case. See also Sugden on Powers, 355. *et seq.* 2 Ball and Beatt. 44. and 4 Dow. P. C. 248.



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*Jackson*, covenanted with the trustees, that, in case the marriage should take effect, the said *Matthew Jackson* should, "within twelve months from the solemnization thereof, by sufficient conveyances, settle and assure unto or to the use of, or in trust for the said *Isabella Darnell*, a sufficient estate during her life, to take effect in possession, from the death of the said *Matthew Jackson*, of and in freehold lands and tenements in the county of *York*, of the yearly rent or value of 100*l.*; or, otherwise, that the said *Matthew Jackson*, or his heirs, should within the time aforesaid, settle and assure unto and to the use of, or in trust for the said *Isabella Darnell*, for life, an annuity of 100*l.* to be issuing out of freehold lands and tenements of a competent value in the county of *York*." And in case *Matthew Jackson* should die before the settlement should be made, the father and son covenanted to pay the plaintiff such annuity.

The marriage took effect, but no settlement was made according to the covenant. In the month of *May*, 1789, *William Jackson*, the father, died, leaving *Matthew Jackson* his eldest surviving son and heir at law, and no other issue, except the [\*] defendant *William Jackson*. *William*, the father, by his will, 18th *February*, 1789, gave several specific and other legacies to his wife, the defendant *Mary*, and in particular 150*l. per annum*, to be issuing out of his estate in *Lackenby*, and, subject to the same and other charges, he gave the said estate to trustees to the use of his son (the defendant *William*) for life, remainder to trustees to preserve contingent remainders, remainder to his first and other sons in tail, remainder to his daughters, remainder to *Matthew* in like manner, with remainders over; and as to their said estates at *Brotton*, after the death of his said sons, and in failure of issue of their bodies, he gave the same to the heirs of his own body, remainder to the defendant *Charles Jackson Skelton*, in fee; and gave other real property, subject to charges thereon, and the rest and residue of his real and personal estate to the said *Matthew Jackson*.

Upon the death of his father, *Matthew Jackson* became tenant for life, in possession, in the estate in *Brotton*, subject to the annuity of 150*l.* to his mother, and of a charge of 2000*l.*; and becoming so seised, was entitled, by virtue of the proviso before stated, to have limited the premises or any part thereof, to the plaintiff for her life, for her jointure; and ought by the said articles to have settled so much thereof as amounted to 100*l. per annum* upon her for life, or to have secured to her, a rent-charge to that amount upon the premises, but he never did any act for that purpose.

*Matthew Jackson* died in the month of *September*, 1790, without leaving any issue, but living the said *William Jackson* his brother and heir at law, and having made his will, whereby he gave a legacy of 50*l.* to his said brother; and after payment thereof, and of his debts, he gave his real and personal estate to the plaintiff *Isabella*, and made her sole executrix, and left a small real estate, and a very small personal estate, not sufficient for the payment of his debts, exclusive of what his estate was liable to answer in respect of the covenant in his marriage articles, and the widow renounced the probate of the will, and the defendant *William* obtained administration to both his father and brother.

The plaintiff filed the present bill, praying that the said marriage articles might be decreed to be specifically performed and [\*] satisfied out of the said estate and premises of *Brotton*, and a proper part thereof of the value of 100*l. per annum* might be allotted to her, and possession thereof delivered to her: but in case the Court should be of opinion, that the plaintiff was not entitled to have the covenant specifically performed

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formed out of the estate, that it might be satisfied out of the real and personal estate of the said *Matthew Jackson* and *William Jackson*.

The suit being amicable, to take the opinion of the Court, in order to bind the issue, if any should be of *William Jackson*, the defendant, or the remainder-man under the will of the father; the defendants, by their answers, admitted all the facts, and submitted to the Court, whether the plaintiff was or was not entitled to have a part of the *Brotton* estate set apart: and if the Court should be of opinion that she was so entitled, submitted to do all necessary and proper acts, and the defendant *Mary* submitted to release her claims upon such lands.

The cause was argued several times, and this day his Honor gave his judgment, in which he referred to all the authorities which had been cited at the bar.

*Master of the Rolls*. — Stated the case, and proceeded to the following effect: —

The prayer of the bill is, to have the covenant satisfied out of the estate, or out of the assets of the husband. — The husband left no assets.

It is contended, that the articles are a good execution of the power. They do not recite the power, and have no reference to it; and as it was to take place in twelve months, it could have no particular reference to these lands: and it is said, that on that account, the husband must have intended to provide for it in some other way. I have given the more attention to the case of the remainder-man, in this cause, because if the covenant is not to bind the land, he must satisfy it out of the personal estate of the father, who joined in the covenant. But I am satisfied that the articles are a good execution of the power. The case of *Coventry v. Coventry*, reported 2 P. Wms. 222. — at the end of *Maxims in Equity*, and 1 Strange, 596. seems to have determined that, where a man having a power over an estate, covenants to make a charge, and dies, the Court will compel an execution of the power, although the bill prays in the alternative, that it may be executed on the land or out of the assets of the covenantor, and there are assets. Two cases are there cited, *Alford v. Alford*, and *Hollingshead v. Hollingshead*; in *Alford v. Alford*, as that case is reported in 2 P. W. 230. a material fact is omitted; it is better reported in Strange, [1 Stra. 604.] where the covenant refers to the power, and is a clear execution of it. It is in the Register's Book, 1707, A. fol. 311., and it appears that he was not in possession, but that having a power to settle, covenanted so to do, when in possession, to the amount of 100*l.* a-year. Then it is clearly a covenant to execute a power then in contingency. He came into possession, but never settled the estate, and it was decreed that the power was well executed. *Hollingshead v. Hollingshead* is a strong case to shew how far the Court will go in the execution of powers: there, an infant having the power when in possession, and marrying, his mother covenanted for him, that he should execute it: the case is accurately reported in Strange; it was not by the Lord Keeper, in 1 Ann, as stated in P. Wms., but by Lord Cooper in 1708. It stands in the Register's Book 1707, A. 571. I am extremely reluctant to lay it down, that, in the case of an infant, the mother could covenant for him further than he could for himself, I therefore sought to see whether he had done any act after he was of age to confirm it, and I cannot but believe he did so.

Then, the question is, whether the present comes within the cases; in this case, no lands are pointed out, it is a mere general covenant, and it is said, though he entered into the covenant, he had something further in view. The father joins in the covenant that the son shall make the settlement. It is argued that there is nothing to shew it was to

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to be out of this estate, I think there is a great deal, for he covenants to assure the jointure, and he had no other estate out of which he could do it. The natural settlement, if they had been called upon within the year to fulfil their covenant, would have been, that the father should have settled; then, the father died before the twelve months expired. Could not the father's representative have called upon the son [\*] to settle? The son, living to be in possession, would have been decreed to do it. So that whether he had the power in contemplation, at the time of entering into the articles or not, having a power to settle, and no other estate, any person entitled might have called upon him to settle. Can his death then make any difference, or shall a remainderman now prevent the carrying the equity of the Court into execution? It seems that where a man has a power and covenants to act, the Court will hold the estate bound. *Andrews v. Emmot* (ante, vol. ii. p. 297.) is the strongest case: it was a case of mere volunteers, and the Court does not act for them in the plenitude of its equity: the husband there had a power to act upon the wife's estate, if he thought fit: he made a will, not referring to the power, but it was argued he must have meant it, because otherwise his effects would not satisfy his legacies: — Lord *Kenyon* cited several cases to shew, that though it was not necessary to recite the power, yet there must be something to shew the testator meant to refer to it, particularly the title *Power*, in 2 Eq. Abr. I fully agree with Lord *Kenyon* as to those dicta. In *Coventry v. Coventry*, (as reported in the end of *Maxims in Equity*) the opinion of Sir *Joseph Jekyll* is strongly expressed “since the statute, if *cestui que use*, for life, with a power, covenants, for a valuable consideration, to execute his power, and in the execution it proves defective, this court aids the execution of it and makes it effectual; nay, further, if he does not execute his power at all, this Court, I conceive, ought to decree an execution of that covenant, as it would be of any other covenant for a consideration, and compel him to execute his power; for as the justice of the Court makes good a defective execution against the remainderman, so if the tenant for life dies before the execution, I conceive there is the same justice due to the purchaser against the remainderman, after his remainder takes place, as there was before, for by the covenant the purchaser has a *lien* upon the estate into whose hands soever it comes.”

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Under these circumstances, I think I do not go too far in saying, 1st. That this power was in the contemplation of the parties at the time of making the articles; 2dly, That this was the only estate upon which the covenant could attach, and that it did attach; and 3dly, That the persons now entitled have a right to call for an execution of the covenant. I do not think [\*] the cases which say, that the Court will not supply the non-execution of powers are affected by this: there it is a duty of imperfect obligation; here he was bound to do it in the way that he could: and the Court will construe it to be intended, for parties claiming *bona fide* and for valuable consideration.

Decree for the plaintiffs, according to the prayer, to have the covenants made good out of the *Brotton* estate. (2)

(2) His Honor declared, “that, under the circumstances of the case, the covenants on the marriage articles, made on the marriage of the plaintiff with her late husband *M. J.* for settling on her, as a jointure, an estate in the county of *York*, of the clear yearly rent or value of 100*l.*, ought, in equity, to be deemed a sufficient execution of the power reserved to the said *M. J.* to make a jointure on his wife, by the indenture of the 2d of *November*, 1787; and that the plaintiff, *Isabella Jackson*, was entitled to have the said covenant, in the said marriage articles, made good out of the estates settled by the said indenture of the 2d *November*, 1787, &c.” R. L.

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HERCY *against* BALLARD.

(Reg. Lib. 1793. A. fol. 159. b.)

27th Nov.

IN *Michaelmas* Term, 1743, Lord *Sidney Beauclerk* and *John Bance, &c.* trustees and executors of *William Hercy, Esq.* exhibited their bill in this court, against the other executors of their testator, and other persons of the family, and, among others, against the present plaintiff his son and heir at law, relative to the plaintiff's affairs; which being very intricate, and various abatements happening, divers proceedings were had in that cause, and other suits brought relative thereto.

Account of rent of an estate held of trustees: the stat. of limitations being insisted on; only ordered for six years before bill filed.

Part of the real estate of the testator, consisted of a freehold house and lands near *Ascott Heath*, which at the death of the testator were let to Mrs. *Cook*, but, upon her death soon after, *John Osmer*, now deceased, entered as tenant to the trustees of the estate, under the rent of 8*l.* per annum, and continued in the occupation thereof till his death, and paid rent for the same till *Michaelmas*, 1748, to *Matthews*, who was receiver under the testator's will; but from the delays in the cause, *Osmer* never paid any further rent, and the arrears thereof remained due at his death, about 1789, when he left issue defendant, *John Osmer*, his son (who entered into and still is in the occupation of the premises,) and the defendant, *Sarah Ballard*, his daughter, whom he appointed executrix.

The plaintiff filed the present bill against the defendants *Ballard* and wife the executrix of *John Osmer* the father, and *John Osmer* the son, praying an account of the rent due at the death of *Osmer* the father, and payment of the same out of his assets, [\*] and of the subsequent rents from *Osmer* the son, and that he might deliver up possession of the premises to the heir at law of the surviving trustee of *William Hercy's* will.

[ \*469 ]

The defendants *Ballard* and wife, (by their answer) admitted the facts and arrear of rent, but insisted on the statute of Limitations, 21 Jac. 1. and submitted to pay the rent in arrear for the six last years, and the defendant *Osmer* (at the bar) submitted to give up possession of the premises.

Mr. *Solicitor General* contended, that the statute of limitations could not be set up in such a case as this, for that the tenant holding of the trustees, and having notice of the trusts, was bound by them; and the setting up the statute as a defence was a fraud; and cited two cases, Lord *Portsmouth v. Vincent*, cited 2 Vesey, 476., where an estate having been stolen out of the possession of the court, Lord *Hardwicke* thought length of time and a fine were not a bar, being founded in fraud; and *Johns v. Menhinnot*, (cited ante, 264 — 268.) where the receiver died much indebted to the estate, and the tenant paid rent to Sir *John Molesworth*, who had a claim upon the property, but from the death of Sir *John Molesworth*, the tenant had paid no rent; and a bill was filed, after a great length of time, praying among other things, the payment of rent. Lord *Thurlow* thought the *lis pendens* was notice to all parties, and said, that he could not suffer the estate to be stolen from the possession of the court.

Lord *Chancellor* thought the plaintiff only entitled to be paid the rents for the six years preceding the filing of the bill; but there being little opposition, ordered the decree to be taken by consent.

1793.

## LLOYD and Another against COLLETT.

28th Nov.

Motion for an injunction to restrain an action against the auctioneer for the deposit, refused, where there had been great delay on the part of the vendor. [If the purchaser demand his deposit at the day for completing the contract, and the vendor has not delivered his abstract before that time, and also neglects to deliver it until after an action brought for the deposit, it is evidence of an abandonment of the contract by the vendor; who shall not be entitled afterwards to a specific performance. (1)]

[\*470]

MR. Solicitor General, supported by Mr. Campbell, moved that an injunction might issue to restrain the defendant from proceeding at law, and that such injunction might extend to stay trial, on the following Case:

[\*] On the 2d of May, 1792, The plaintiff, Young, caused printed particulars and conditions of sale, of the ground-rents in question, to be delivered, and on that day, the premises were put up to be sold by public auction, but were not then sold. — On the 10th of August, 1792, the defendant agreed, by writing indorsed on one of the printed particulars, to purchase the premises for 2609*l.* 17*s.*; and the purchase was to be completed on or before 25th March, 1793, and paid the plaintiff, Young, the auctioneer, 100*l.* deposit.

On the 6th November, 1793, the plaintiffs filed their bill against the defendant for a specific performance of the agreement, and for an injunction to restrain Collett from proceeding in the action which he had brought for the deposit.

On the 16th November, 1793, The defendant put in his answer, stating the following facts, which, as far as related to the conduct of the vendor and purchaser, could not be controverted.

He admitted the agreement, but said that he had frequently, between the 10th of August, 1792, and the 25th of March, 1793, applied to the plaintiff, Young, to his clerk, and to Mr. Woodcock, the plaintiff's solicitor, for an abstract of the title, but could obtain no abstract relating thereto: and that shortly after the 25th March, 1793, he applied to the plaintiff, Young, for his deposit, with interest from 10th August, 1792; And that the plaintiff, Young, having desired him to write a letter to him, which he might show to Mr. Woodcock, the defendant, 4th April, 1793, wrote a letter to Young, insisting upon his deposit. — That he repeatedly applied for his deposit, between the 4th April and the 10th June, 1793, when he brought his action:

That no abstract was delivered or left with the defendant till the 16th September last, at which time defendant was out of town:

(1) From Mr. Campbell's MS. note of this case, in Lord Colchester's collection. See also the judgment at length, *postea*, 472, note (from 4 Ves. 689, 690, note). A mistaken and very injurious practice long prevailed, from the courts of equity considering time as of no consequence, and delay as affording no impediment to decreeing specific performance of agreements. This was supposed to originate in a dictum attributed to Lord Hardwicke, in the case of *Gibson v. Pattison*, 1 Atk. 12., which is now proved to be totally erroneous. See 4 Ves. 689, 690, note, and *postea*, 471, note; and in *Fordyce v. Ford*, *postea*, 497. The principal case seems to be one of the first in which the practice began to be corrected; and the benefit is attributable, in a great degree, perhaps, to Lord Loughborough having detected the error in *Gibson v. Pattison*, which his Lordship stated at length in the principal case. A note in 4 Ves. 720. attributes the first repugnance to follow the previous stream of authority to Sir Lloyd Kenyon M. R. (See *Macreth v. Marlow*, 1 Cox, 259.) The case of *Gregson v. Riddle* (in 1783 and 1784), cited by the late Sir S. Romilly from his own notes in 7 Ves. 268, 269, is a remarkable instance of the pertinacity with which the courts formerly adhered to the old practice. The principle, in the present case, as above, was soon acknowledged in *Fordyce v. Fordyce*, *postea*, 497, 498, and has been confirmed by a variety of decisions. *Spurrier v. Hancock*, and *Harrington v. Wheeler*, 4 Ves. 667. 686. *M. of Hertford v. Moore*, 5 Ves. 719, *et seq.* *Omerod v. Hardman*, *ibid.* 722. 736. *Guest v. Homfray*, *ibid.* 818, &c. &c. Lord Eldon C. seems to state the moderate and sound principle shortly in *Steen v. Slade*, 7 Ves. 275. *et seq.*, and in *Lay v. Linde*, 3 Meriv. 84.; and Lord Redensdale adopted the same course in his practice as Lord Chancellor in Ireland. See (*inter alia*) in *Lennon v. Napper*, 2 Scho. & Lefroy, 682, 683, 684, 685, &c. Mr. Sugden has also deduced the true principles upon which the courts now proceed, with his usual perspicuity and ability. *L. Venders & Purch.* 324. *et seq.* to 349. (5th ed.)

On the 25th *October*, The defendant, upon his return to town, wrote a letter to Mr. *Woodcock*, insisting that he would not complete his purchase.

[\*] He stated, by his answer, the value of the ground-rent, and the value of the Government Long Annuities, at the time he entered into the agreement; and on the 16th *September*, 1798; and from thence inferred that the value of the ground-rent was diminished 560*l.* and upwards: that if he had been furnished with the abstract in due time, he believed he could have sold the ground-rent to advantage.

In support of the motion, it was urged, that the lapse of time was not regarded in a court of equity: that it was an established principle, that such an agreement ought to be performed, and that the delay, in this case, was not equal to that which had occurred in many other cases in which agreements had been decreed to be performed; although it was morally certain that much greater delay might happen than had happened, or could happen in the present case: they cited *Pincke v. Curteis*, (*ante*, p. 329.) and the cases there cited—and *Gregson v. Riddle*, (2) also *Gibson v. Patterson*, (3) 1 Atk. 12.

The *Chancellor* asked if there was any case (where no step whatever had been taken by the one party, and the other had, immediately when the time was lapsed, insisted upon his deposit, and refused to perform his agreement) in which the agreement had been directed to be performed.

To which it was answered;

That in *Pincke v. Curteis*, applications were made for the abstract by one of the parties, previous to the expiration of the time, but none was delivered: that applications had been then soon after made for the deposit: that no abstract was delivered till three weeks afterwards; and when delivered, the defendant immediately insisted again upon his deposit: that greater delay must necessarily have occurred in that case: nay it was possible in that case, that no title ever could be made, as the question upon which the title depended was then litigating in the King's Bench, and therefore the agreement might never be performed: yet the injunction was granted.

(2) Stated by Sir *S. Romilly*, from his own MS. note, in *Seton v. Slade*, 7 Ves. 268, 269.

(3) Lord *Colchester's* MS. notes on the principal case state, that "at the first seal after term the Lord *Chancellor* mentioned that matter again, and said, that, upon looking into the register book for the case of *Gibson v. Patterson*, it did not appear to warrant the report of it in 1 Atk. 12., and his Lordship read an extract of it for that purpose."

An accurate statement of that extract is in Mr. *Vesey's* note to *Harrington v. Wheeler*, 4 Ves. 690., which demonstrates that the case itself furnished no ground for Lord *Hardwicke's* making the observation reported on 1 Atk. 12. as applicable to other cases. Lord *Colchester's* MSS. contain a copy of the above-cited case, as thus read in Court on the occasion, which is as follows:—

"*Elizabeth Gibson v. Thomas Patterson, John, Joseph, and James Liddell* (mortgages). Mr. *Faxakerley* for plaintiff.

"Bill for the performance of an agreement for a purchase, 260*l.*

"30th Nov. 1737, articles on or before 2d February next.

"*Thomas Jefferson*, on or about 11th March, 1734. Plaintiff acquainted defendant

"that she was ready to convey: defendant told plaintiff he would not stand to his bargain, for he had no money, and if she pressed him, he would fly into Scotland.

"*William Stourdy* believes *Liddell* would have accepted his money, and have joined

"in a conveyance. He took instructions for a conveyance. Defendant *Pattinson*

"countermanded, and said he would not stand to his bargain.

"*John Brandler*. That defendant *Pattinson* demised part of the premises to plaintiff

"for a year, at 4*l.* per annum.

"Mr. *Attorney General* for defendant *Pattinson*.

"*William Stourdy* cross-examined.

"Decree for performance of the articles."

Mr. *Graham*,

1793.

LLOYD  
against  
COLLETT.  
[\*471]

1793.

LLOYD  
against  
COLLETT.  
[ \*472 ]

Mr. Graham, *contra*, cited *Macreth v. Marlar*, (4) (*Vide Whittaker v. Whittaker*, *ante*, p. 31.) and a late case at the Rolls.

[\*] The Chancellor considered the conduct of the vendor as evidence of an abandonment of his contract; and

Refused the motion. (5)

(4) *Macreth v. Marlar* is shortly stated in Lord Colchester's MSS., but now reported 1 Cox. Ca. Ch. 259. *quod vide*.

(5) A very valuable note of the Lord Chancellor's judgment on this occasion is annexed to the case of *Harrington v. Wheeler*, in Mr. Vesey's note to his 4th vol. 690., which is as follows:—

The conduct of the parties, inevitable accident, &c. might induce the Court to relieve against a lapse of the day fixed for completing a purchase.

Lord Chancellor—“ There is nothing of more importance than that the ordinary contracts between man and man, which are so necessary in their intercourse with each other, should be certain and fixed; and that it should be certainly known when a man is bound, and when not. There is a difficulty to comprehend how the essentials of a contract should be different in equity and at law. It is one thing to say, the time is not so essential that, in no case in which the day has, by any means, been suffered to elapse, the Court would relieve against it, and decree performance. The conduct of the parties, inevitable accident, &c. might induce the Court to relieve. But it is a different thing to say the appointment of a day is to have no effect at all, and that it is not in the power of the parties to contract that, if the agreement is not executed at a particular time, the parties shall be at liberty to rescind it. In most of the cases there have been steps taken. Is there any case in which, without any previous communication at all between the parties, the time has been suffered to elapse? I want a case to prove, that, where nothing has been done by the parties, this Court will hold in a contract of buying and selling a rule; that, certainly, is not the rule at law, that the time is not an essential part of the contract. Here no step has been taken, from the day of the sale, for six months after the expiration of the time at which the contract was to be completed. If a given default will not do, what length of time will do? It is true the plaintiff must have considered himself bound after the day: so he was: he could not take advantage of his own neglect. He says, ‘ by my own default this contract is void in law: I cannot succeed at law; on the contrary, the other party is entitled to recover back the money he has paid in expectation of the execution of his contract, therefore an equity arises to me.’ An equity out of his own neglect! It is a singular head of equity. The consequences of this idea, which I know has prevailed, have been extremely inconvenient. The hardship generally falls upon the other party. The utmost extent of relief, where the party is discharged at law, would be on making him full compensation. Is interest of the purchase-money compensation? The time may go on for years. Suppose the subject was an estate sold for payment of debts: debts and legacies carry interest at 5 per cent.; the purchase-money may carry 4 per cent. from the time the contract ought to have been completed. Where it is with a view to a re-sale, as in this case, what is the consequence? Here a man has purchased these ground-rents upon a speculation which is totally defeated. I see no reason to enjoin the action. You deliver yourself from that by paying the money. The action is against the auctioneer. I do not think the equity extends to him, for he personally contracts; and he, receiving the deposit money, will return it, if the terms are not complied with.”

### CRIPPS and others *against* JEE and others.

Rolls, 2d Dec.

(No Entry.)

An absolute conveyance decreed to be only a security for money (1), on parol evidence; it being clear, on the written evidence, and the accounts of the parties, that the agreement was not what the deed purported it to be.

THE bill stated, that the plaintiff, *William Cripps*, being entitled to the premises in question, in reversion after the decease of his mother, and having, by deeds dated 7th and 8th September 1780, conveyed

(1) A bill was filed upon the ground of an absolute conveyance against the owner of the estate, charging him as bailiff, and praying an account of rents and profits against him in that capacity, for an injunction, receiver, &c. The defendant opposing an interlocutory

veyed the same to trustees, in trust, by sale or mortgage, to pay certain debts, and then to re-convey the same to him; and having occasion for the sum of 300*l.* applied to a person of the name of *Collinson* to lend him the same, and offered him a security for the same on the premises, and other advantages; that *Collinson*, instead of complying therewith, informed the defendant, *Thomas Rogers*, the brother of the plaintiff *Catherine* (wife of the plaintiff *William*) of the plaintiff's offer, and advised him to inform *Thomas Rogers*, and others, (his father, and the father of the plaintiff *William Cripps's* wife,) and to prevail on him to advance the money, in order to prevent the plaintiff *William* from making an improvident bargain with strangers, to the prejudice of his wife and family. *Rogers* the elder, not having the money, he and his son, in order to obtain the same, applied to *John Odell*, who lent the same on the security of their joint bond, and it was agreed, that for the indemnity of the *Rogerses*, the plaintiff, *William Cripps*, should convey to them the premises, subject to the life estate of the plaintiff, *William Cripps's* mother, and the former charges thereon.

The bill further stated, that an attorney named *George Pitt Hunt*, (the admissibility of whose evidence was the principal question in the cause) was employed to carry this arrangement into execution, and that he proffered deeds, purporting to be indentures of lease and release, bearing date 15th and 16th *May*, 1781, the release being of two parts, and being between the plaintiff, *William Cripps* of the one part, and *Thomas Rogers* the elder, and *Thomas Rogers* the younger of the other part, and reciting that plaintiff, *William Cripps*, had contracted and agreed [\*] with the said *Thomas Rogers* senior, and *Thomas Rogers* junior, for the absolute sale of all his estate and interest in the premises, and witnessed, that in consideration of 300*l.* the plaintiff released unto the said *Thomas Rogers*, and the defendant *Thomas Rogers* the younger, the premises, to hold to them, their heirs and assigns for ever, and the plaintiff *Cripps* remised and released to the said *Thomas Rogers* the elder, and *Thomas Rogers* the younger, all surplus monies which might arise from the sale of the premises, after payment of the several sums of money and interest thereon, mentioned in the said indenture of release, to be due to the persons therein mentioned, from the said plaintiff.

The bill further stated that the intent and meaning of the parties to this conveyance were, that the surplus money to arise from the sale of the premises, after payment of the charges upon the same, should be paid to *Cripps*, and that the *Rogerses* were only to be trustees for him.

terlocutory motion, an issue was directed, as whether the plaintiff was or not a mere mortgagee of the premises under the circumstances. The jury found in the affirmative. The plaintiff, upon this, amended his bill, converting his former prayer into one for a foreclosure, and afterwards filed a supplemental bill, upon perceiving his embarrassment from the subsequent facts: the defendant having put in his answer, stating the result of the verdict, moved for the costs up to the time of filing the supplemental bill; and that the bill so amended might be taken off the file.

And per Lord *Eldon* C. — "I have no difficulty in saying that the defendant is entitled to all the costs sustained by him, beyond what he had been put to if the bill had been originally a bill for a foreclosure; such as the costs of the issue at law, and of this application. I think that the defendants might have dismissed the first bill with costs. I cannot, however, go to the length of the motion in ordering the amended bill to be taken off the file as it is set down for hearing. Order made for payment of the costs sustained beyond, &c. (as above), and they were directed to be paid by the plaintiff forthwith, and not to be set off against what was due to him on his mortgage security. This, after much argument and consideration." — From the Report Cooper's Ch. Ca. 141, and the Editor's briefs in the cause.

1793.

Cripps  
against  
Jnr.

[ \*473 ]

Thomas



1793,

Cripps  
against  
Jee.

*Thomas Rogers* the elder died in 1783, by which the joint estate in the premises under the indenture of 15th and 16th May, 1781, survived to *Thomas Rogers* the younger.

*Thomas Rogers* the younger carried on trade in co-partnership with his brother *John Rogers*, and a commission of bankrupt issued against them in May, 1788, and the defendants were chosen assignees.

*Thomas Rogers* the elder made his will, and appointed his wife *Elizabeth* executrix, and by such will gave a legacy of 300*l.* to his daughter *Susannah*, who afterwards intermarried with the plaintiff *Joseph Cripps*, brother to plaintiff *William*, and the said *Elizabeth* agreeing to give to *Susannah* an additional 100*l.* and the sum of 300*l.* remaining due, with a great arrear of interest from plaintiff *William* to *Elizabeth Rogers*, as executrix, it was proposed that the premises should be conveyed to trustees upon the trusts after mentioned, and by indenture bearing date in the year 1790, *William Cripps*, *Elizabeth Rogers*, and *Thomas Rogers* the younger, conveyed the same to the plaintiffs, *Joseph Cripps* and *John Williams*, in trust to sell the premises, and to pay the incumbrances charged by the indentures of 7th and 8th of September, [\*] 1780, to pay the sum of 400*l.* and interest to *Susannah Rogers*, and to place out the residue on securities, and pay the interest thereof to plaintiff, *William Cripps*, for life, remainder to *Elizabeth* his wife, for her life, and afterwards to divide the same among their children, as therein mentioned.

[ \*474 ]

The bill stated that 4*l.* 5*s.* of the interest due by the plaintiff *William Cripps*, was due to the defendant, *Thomas Rogers* the younger, the same having been advanced by him to *John Odell*, on behalf of plaintiff *William Cripps*, and the residue of the principal and interest had been paid by *Thomas Rogers* senior, and was therefore due to his executrix.

The plaintiffs stated further, that the defendants insisted that the estates, by virtue of the indenture of the 15th and 16th May, 1781, are the property of *Thomas Rogers* junior, and passed to them by the commissioners' assignment for the benefit of the creditors, and that the conveyance was absolute and unconditional.

The plaintiffs charged the contrary to be true, and as evidence thereof, charged, that *Thomas Rogers* junior had made an entry in a book kept by him, to the purport following, "1782, May 15, paid Mr. *Odell* a year's interest of 300*l.* on *William Cripps*'s account, 15*l.* — Received " of *William Cripps* 7*l.* 10*s.* due 7*l.* 10*s.*" — and also a note and bond given by *Elizabeth Rogers* and *Thomas Rogers* junior, to *Barnard* and *Mott*, for the debt of *Cripps*, in which they acknowledged themselves to be trustees of *Cripps*'s estate; they therefore charged that these were declarations of trust manifested and proved, signed by the persons by law enabled to declare such trust, and prayed that the indentures of 15th and 16th May, 1781, might be cancelled.

The assignees by their answer insisted, that the indentures of the 7th and 8th September, 1780, were, and were intended by the parties as an absolute conveyance from the plaintiff *Cripps*, to *Thomas Rogers* senior, and *Thomas Rogers* junior, and not in trust only; that with respect to the second conveyance, it being executed after the bankruptcy of *Thomas Rogers* junior, was void, and that the estate was vested in them by the commission of bankrupt, and bargain and sale from the commissioners to them.

[ \*475 ]

[\*] At the hearing, the evidence of *George Pitt Hunt*, the attorney, concerned in the transaction, being offered to be read for the plaintiff, the same was objected to, but was read *de bene esse*.

He deposed, that he was consulted by *Rogers* upon the subject of advancing the money to *Cripps*, and taking a security for the same; that  
*Rogers*

*Rogers* observed that, though the security should be an absolute conveyance from *Cripps* to him, he meant to take no other advantage of it than as a security for his own 300*l.* and interest; and if any thing should remain, it should be applied for the benefit of *Cripps* and his family; and that in a conversation upon the subject between the parties to the deed, the witness observed, that a deed might at any time be prepared to explain the intention of the parties, and declare the trusts as to the surplus monies; but as it was wholly a family matter, and no advantage was intended to be taken, it was not of any material consequence whether it was prepared immediately or not: and that, in fact, the witness had instructions at the time to prepare such instrument, but omitted it merely from the knowledge of the circumstances, and the connection between the parties concerned. He also proved the circumstances relative to the receipt. Declarations also of *Rogers* the younger, that he was a trustee for the plaintiffs, were in evidence.

Mr. *Selwyn* and Mr. *Scafe*, for the defendants, insisted, that this evidence ought not to be read in contradiction to the deed; unless it was first proved, that the agreement was that it should be a trust, and that the agreement was omitted from the deed by fraud or mistake. To prove this position they cited *Lord Irnham v. Child*, (*ante*, vol. i. p. 92.) If it were permitted to be read, this would be the strongest case ever determined. In *Williams v. Bonham*, there was a draft of an agreement by which the deed could be corrected; but here, the absolute conveyance is to be converted into a security, which cannot be by parol evidence; and the only written evidence (the receipt) is not sufficient for the purpose.

*Master of the Rolls.* It is clear, from the written evidence, that the agreement really made between the parties, was not that stated by the deed: will not that be sufficient to let in the parol evidence? [\*] In *Irnham v. Child*, Lord *Thurlow* laid down the rule very clearly, that the omission must be proved to be either by fraud or mistake, in order to introduce the parol evidence. Here, is that equity *dehors* the deed which he required. Here is evidence, from the parties themselves, that the transaction was not what the deed purports it to be: this introduces *Hunt's* evidence; and he accounts for its being made an absolute conveyance, and makes it clear that the *Rogerses* were intended to be trustees, and that it was a pious fraud, as it was thought better they should not appear such: and the plaintiffs may clearly come for a redemption. The whole has arisen from the bankruptcy of *Rogers*.

Decree an account of all sums of money paid to the *Rogerses*, and there must be a re-conveyance, on payment of costs by the plaintiffs.

1798.

Cripps  
against  
Jes.

[\*476]

## ORDER against WADE.

(Reg. Lib. 1793. A. fol. 40.)

Lincoln's Inn  
Hall, 9th Dec.

MR. *Cox* moved, that a will might be delivered out of the office of the Ecclesiastical Court, to the solicitor in the cause, in order to its being produced at the hearing of the cause, on his giving security to return it safe and undefaced. It was grounded on a case of *Williams v. Floyer*, Amb. 343., where a case of *Frederic v. Aynscombe* is cited, in which a like order had been made by Lord *Hardwicke*.

Will ordered  
to be delivered  
out of eccle-  
siastical court  
to the solicitor,  
on security to  
return it. (1)

(1) See accordingly *Lake v. Canfield*, *Anten*, 5 vol. 263; and the Editor's note.

1793.

FORDE  
against  
WADE.

Lord Chancellor said, this practice was introduced by Lord Talbot. It has been before done by Lord Macdlesfield in the case of a bond. In the case before Lord Hardwicke, he said no notice to the officer was necessary: it was there done by consent of all parties.

Ordered, by consent, that it be delivered to the solicitor, he having first given security before a Master to return it. (2)

See *Lake v. Cansfield*, ante, vol. iii. p. 263.

(2) To return the said will again, not erased or defaced, after the hearing of the cause. R. L.

[ \*477 ]

[Vide S. C.  
ante, 3 vol.  
388. upon a  
plea.]

Lincoln's Inn  
Hall, 12th Dec.

Performance  
cannot be de-  
creed of an  
agreement with  
a variation  
made in it by  
the Court. (1)

[\*] JORDAN against SAWKINS.

(Reg. Lib. 1793. A. fol. 32.)

AFTER the allowance of the plea in this cause (*vide ante*, vol. iii. p. 388.) the plaintiffs amended their bill: among other things, it was stated that there was annexed to the original agreement, a memorandum, that Sawkins was to pay the land-tax. To the amended bill, the defendant put in an answer, and the cause came on to be heard, before the late Lords Commissioners Ashhurst and Wilson, on the 25th January last.

Mr. Mansfield and Mr. Abbot, for the defendant, rested his defence on two grounds, 1st. That the defendant, at the time of the agreement, was in a state of intoxication; and, if this was not satisfactorily proved, that he was in general a weak man. 2d. That the consideration was inadequate, which was itself evidence of fraud. They cited *Heathcote v. Paignon*, (*ante*, vol. ii. p. 167.) and the note in p. 176. They argued that the question here was not whether the case was sufficient to rescind a contract, but whether it was sufficient to induce the Court to refuse its assistance, to compel performance of it, and leave the parties to their remedy at law; and cited *Savage v. Taylor*, Forrester, 234., to show the distinction between these two cases.

The evidence not supporting the defendant's case, but there appearing to be some hardship, the Lords Commissioners decreed a performance of the contract, with the variation, that it was to be at a clear rent of 40*l.* without deducting land-tax.

The cause came on now, to be re-heard before the Lord Chancellor, when Mr. Attorney General and Mr. Stanley, for the plaintiffs, insisted on the fairness of the contract, and contended that it ought to be carried into execution.

Mr. Mansfield and Mr. Abbot argued against the decree, on the same grounds on which they had supported the original defence; and in addition, argued upon the variation made in the agreement by the Lords Commissioners, that the Court would not specifically perform an agreement with a variation in the terms of it, and cited *Earl of Warrington v. Langham*, Pre. Ch. 89.; *Champernoon v. Gubbs*, Pre. Cha. 126. 2 Vern. 382. S. C.

(1) See this case on the former occasion, *ante*, 3 vol. 388, &c. with the Editor's notes. *Legal v. Miller*, 2 Ves. 299., and *Woollem v. Hearn*, 7 Ves. 211. A defendant, however, disproving the agreement set up by the plaintiff, may have a decree for such agreement as he can substantiate. *Fife v. Clayton*, 13 Ves. 546. and *Gwynn v. Lettbridge*, 14 Ves. 585.

Lord

[\*] Lord Chancellor said, the weight of the evidence was, that the defendant was not intoxicated: but, upon the whole, he appeared to have been imposed upon, and not to have had the assistance he ought to have had. If the agreement had been carried into execution as it originally stood, *Sawkins* must have paid the land-tax, as being the landlord's tax. — The Court cannot specifically perform an agreement with a variation. (2)

Reverse the decree, and dismiss the bill.

(2) See the references in note (1) *ante*.

GARDINER *against* MASON.

MASON *against* GARDINER.

(Reg. Lib. 1793. A. fol. 50.)

1793.  
JORDAN  
against  
SAWKINS.  
[ \*478 ]

Lincoln's Inn  
Hall, 12th Dec.

**CAUSE and Cross-cause.** — The cross-bill was a second bill filed after a demurrer allowed (*vide ante*, p. 436.) Mr. *Leach* had moved, at the former seal, on behalf of the plaintiff in the cross-cause, that the proceedings in the first cause might be stayed until the defendant in the second cause (plaintiff in the former) had entered an appearance in the second cause, and that service upon his clerk in Court, in the first cause might be deemed a good service.

[In cause and cross-cause publication in the original suit stayed until after appearance to the cross-bill. (1)]  
Of costs on the allowance of the demurrer.

The motion was grounded on an affidavit that the plaintiff (in the cross-cause) having been informed that the defendant lived in *Ireland*, caused a *subpoena* to be sued out, and application to be made to the defendant's solicitor to accept service thereof as good service on the defendant, which was refused, and that the defendant was proceeding in the first cause.

Mr. *Leach* cited *Anderson v. Lewis*, (*ante*, vol. iii. p. 429.)

Mr. *Attorney General*, who was on the other side, being absent, the motion stood over.

And on this day, Mr. *Attorney General* opposed the motion, and observed, that, upon the original motion, his Lordship inclined to think it improper; although he thought service on the clerk in court should be deemed good service, as till service in some [\*] way or other the party could not appear. He cited Gilbert's *Forum Romanum*, 46 & 47, to show that the proceedings ought not to be stayed, but only publication; and made the further objection, that this being a second cross-bill, after a demurrer allowed to the former, the plaintiff ought not to be permitted to proceed till he had paid the costs of the former cross-bill.

[ \*479 ]

Mr. *Leach*, as to this objection said, that in a late case his Lordship had decided that the original plaintiff could only take the 5*l.* costs on the allowance of the demurrer †; that by the demurrer the cause was

† See *post*. 545, a general order to correct this practice, [and Beames Ord. Ch. 456, and the note. Also *Wood v. Dynely*, 1 Madd. Rep. 32. *Pilkington v. Wignall*, 2 Madd. Rep. 240. 348., and *Lansdown v. Elderton*, 8 Ves. 526, 527.]

(1) Mr. *Brown*'s marginal note of this case was incorrect. The above is agreeable to the order made upon the point of practice, and upon service on the clerks in Court. See *Anderson v. Lewis*, and *Bond v. Duke of Newcastle*, *ante*, 3 vol. 429, and 386, with the references in the Editor's notes.

1793,

GARDINER  
against  
MASON.

out of court, and the plaintiff cannot have leave to amend, 2 Peere Williams, 300., and the note there.

Mr. Mansfield, as *amicus curiæ*, referred to a case where he had moved for further costs than the 5*l.*, and Lord Chancellor said he could not give them.

Lord Chancellor said, he found himself embarrassed as to the point of costs; he should be glad to correct the practice, but it must stand, till it was altered. — As to the other parts of the motion, he thought publication ought to be stayed in the original bill, till after answer (2), to the cross-bill: the clerk in court must have an authority arising out of the original cause, therefore he thought service on him must be good service.

(2) The order was (*only*) until appearance. R. L.

## GARDINER against MASON.

(Reg. Lib. 1793. A. fol. 59.)

Yatcohi's Inn  
Hall, 13th Dec.

Papers specifically referred to in an answer, and admitted to be in defendant's custody, may be ordered to be inspected by the plaintiff. (1)

[\*480]

MR. Attorney General moved, on the behalf of the plaintiff, that the defendant might leave in the hands of his clerk in court, for the perusal of plaintiff's solicitor, the several letters and copies of letters, stated in the defendant's answer to have been found among his late father's papers, respecting the purchase of the estate mentioned in the pleadings in the cause, particularly the copy of a letter written by his said late father to Messrs. Symson and Robertson, and other letters and papers, and might produce the same at the hearing of the cause.

[\*] Mr. Leach opposed this motion; he said the rule was, that the defendant was compellable to produce papers admitted by the answer to be in his custody; but the papers, to fall within the rule, must be essential, and tend to support the plaintiff's bill; not as the papers here do, tend to defeat his title: It extended also only to papers that were specified. Here the reference was general to letters and copies of letters. The cross-bill was founded on these papers, and to disclose them would put the plaintiff in possession of the defendant's defence. In *Davers v. Davers*, 2 P. Wms. 409., a similar order was refused. He might say in this case, as Mr. Lutwyche did in that "the other side can have no right to see the strength of my cause, or the evidence of my title before the hearing." *Hodson v. Warrington*, 3 P. Wms. 34.

Lord Chancellor said, if the defendant relied on a paper, that made it material; and made the order as to the only letter specifically referred to in the answer. (2)

(1) See accordingly *Taylor v. Milner*, 11 Ves. 41. *Somerville v. Mackie*, 16 Ves. 382, &c. *Evans v. Richards*, and the *Princess of Wales v. Earl of Liverpool*, 1 Swanst. Rep. 8. 121. See also *Atkins v. Wright*, 14 Ves. 211. *Beckford v. Wildman*, 16 Ves. 438., and *Marsh v. Sibbald*, 2 Ves. and Beames, 375.

(2) The order was in fact made according to the terms of the motion, and specified various letters and papers admitted in the answer. R. L.

1793.

COLLIS *against* SWAYNE.

(No Entry.)

*Lincoln's Inn  
Hall, 14th Dec.*

**BY** the bill, the plaintiff stated, that the defendant having applied to him for leave to use his name, as a trustee in a mortgage, for money due to him (the defendant) from a relation, afterwards induced him by artifice, and assurances that the security was good, and promises of indemnity, to advance the money; and that he (the plaintiff) became the principal mortgagee, and was afterwards evicted of the estate: he charged that the defendant, by different letters, in answer to others written by the plaintiff, considered himself as the only person liable to the risk, and had promised the payment of the money: the plaintiff, therefore, by the bill, prayed a discovery, and that plaintiff might be declared a trustee only for the defendant, as to the mortgage; and to have the money repaid, as being advanced at the special request and undertaking of the defendant; offering to assign all his right to the defendant, and for further relief.

Where a bill prays relief and discovery, the plaintiff being entitled to discovery only, a general demurrer allowed. (1)

The defendant demurred both to the discovery and relief.

Mr. Romily, in support of the demurrer, said, that Lord Thurlow had decided, that where a bill was filed for discovery of evidence, [\*] to which the plaintiff was entitled, if it proceeded to pray relief, a general demurrer both to discovery and relief was good. He cited *Price v. James*, (ante, vol. ii. p. 319.); *Measter v. Branston* (cited *ibid.* 282.) and *Charles v. Taysum* in the Exchequer July, 1792, where this was considered as the established practice, and to have been so since *Price v. James*.

[\*481]

Lord Chancellor. — Though he admitted that the plaintiff was entitled to the discovery of the letters, allowed the demurrer.

(1) This is the correct practice, agreeably to *Price v. James*, ante, 2 vol. 319., and *Fry v. Penn*, *ibid.* 280, is wrong. See the Editor's notes upon each of these cases, and more especially the reference to Beames's Elem. Pleas, 250, and note (3). 6 Ves. 63. 686. 8 Ves. 3. 9 Ves. 71.

EMANUEL COLLEGE CAMBRIDGE, *against* The Bishop of NORWICH and Others.

(Reg. Lib. 1793. A. fol. '61.)

*Lincoln's Inn  
Hall, 14th Dec.*

**HENRY MILD MAY** seised in fee, *int' al'* of the advowson of the vicarage of the parish church of *Twysford*, and also of *Ouslebury* com. *Hants*, and also of the advowson of the rectory of *Henstead* in *Suffolk*, made his will and codicil, dated respectively the 1st and 4th of *November*, 1704, and thereby devised as follows " *Item*, I do direct and appoint that the vicarage of the said *Twysford* and *Ouslebury* parishes, when become vacant, shall from time to time, by the persons then entitled, as to the presentation, be tendered to *Emanuel College, Cambridge*, so as the election be made of a person resident at the same time in the said college." And as to the said rectory of *Henstead* aforesaid, he by his codicil devised in the words following, " *Item*, I do devise to the Master and Fellows of *Emanuel College*, the successive presentation for

After a clear gift to a college of three presentations to a living their interest cannot be extended by doubtful words.

1798,  
 EMANUEL  
 COLLEGE  
 CAMBRIDGE  
 against  
 The Bishop of  
 NORWICH  
 and Others.  
 [ \*482 ]

three turns, or alterations from the present incumbent, Mr. *Lawrence Eachard* to the church of *Henstead* in *Suffolk*, so as the said election be made to such person as at the same time, and before is and was resident in the said college, and as the parties then concerned can agree, the said college to proceed in the future elections."

The testator died in 1704, the defendants are the Ordinary of the diocese, and the heir at law of the testator.

After the death of Mr. *Lawrence Eachard*, the college presented for three successive turns, and the bill stated, that upon [\*] the death of Doctor *John Gardon*, the late incumbent on the presentation of the College, the right of presenting to the church a fit person *when nominated by the College*, devolved upon some of the defendants, and that the College had nominated the Rev. *John Oldershaw*, and applied to the other defendants to present him to the defendant, the diocesan, to be instituted to the living.

The bill stated the refusal of the defendants, and that they pretended that *all the interest or right of the college in the nomination as well as presentation to the living, ceased after the period, when three successive incumbents had been presented by the College*, whereas the College charged, that by the true construction of the codicils, their right to the presentation terminated after the three turns, when the rectory of *Henstead* was to be presented to in like manner, with the vicarages of *Twyford* and *Ouslebury*, that is to say, the persons entitled under the devise, or as heirs at law of the said testator, to the presentation of *Henstead* aforesaid, being the parties concerned with the said College, directed to present the nominee of the said Master and Fellows.

The plaintiffs nominated the Reverend *John Oldershaw*, but the defendants refused to present him, and brought a *Quare impedit* against the plaintiff, in which they succeeded; upon which the plaintiffs filed the present bill, to have the trusts of the codicil executed; to which the defendants demurred.

Mr. *Attorney General*, Mr. *Mansfield* and Mr. *Sutton* for the plaintiffs, insisted that the Court would not reject any words to which it could give a meaning, and here the subsequent words may mean the College, and those who have the right of presentation, and must apply to something to be done after the three presentations have been satisfied.

Mr. *Solicitor General* and Mr. *Hollist* said, that the Court of *Common Pleas* had decided, that the subsequent words did not make a legal devise of the future nomination, after the three turns expressly given, that they must refer to the subsequent nominations after that of Mr. *Eachard*, or they would be nonsense, and that where a limited interest was expressly given, as a further interest could not be implied, unless the intention to give it was [\*] perfectly clear. If the testator had intended here, to give a perpetual nomination, he would have said in *all* future elections.

Lord *Chancellor*.—He has given the three turns expressly to the College, I do not think myself bound to discover what his further intention was or whether he had any intention. He meant the presentation to remain in his family, but that they should consent according to the nomination of the College, and that the person to be presented should at the time be resident in the College, which would be good, though he became resident after the vacancy. If the College had exhausted their members, the family might have presented other persons. This is something like his meaning, I do not say it is so—but it is clear here is no equitable gift of the future nomination.

Demurrer allowed.

[ \*483 ]

1794.

SOCKETT, Esq. and his Wife against WRAY and Another.

(No Entry.)

Rolls, 17th Jan.

THE bill stated, that by indenture 24th February, 1791, made between the defendants *Wray* and *Morgan* of the one part, and the plaintiffs of the other part, and reciting that the defendant *Wray* had invested 1000*l.* in the names of himself and *Morgan*, in the purchase of 1234*l.* 2*s.* 1*d.* 3 per cent. consols., it was witnessed that in order to declare the trusts thereof, the said *Wray* and *Morgan*, by and with the express privity, consent, and direction, or appointment of the plaintiff *Sockett*, covenanted to stand possessed of the stock and interest, upon trust, that they should from time to time during the life of the plaintiff *Catherine Sockett*, pay over the dividends into the proper hands of the plaintiff, *Catherine Sockett*, and for her sole, absolute, peculiar, and separate use and benefit, or to such person or persons as she by any note or notes, instrument or instruments, writing or writings, to be by her signed, notwithstanding her present coverture, should direct or appoint, and it was further agreed and declared, that the plaintiff *Henry Sockett* should not intermeddle therewith, nor should the same be subject or liable to his controul, debts, or engagements, and that the receipt and receipts of plaintiff *Catherine Sockett*, signed by her [\*] proper hand, or of such person or persons as she should in manner aforesaid appoint to receive the same, should from time to time notwithstanding her coverture, be a good and sufficient discharge for the said dividends, &c.; and after the decease of plaintiff *Catherine Sockett*, upon trust, that the trustees, &c. should transfer the said sum of 1234*l.* 2*s.* 1*d.* unto such person or persons, at such time and times, in such parts, shares, and proportions, and in such sort, manner, and form, and subject to, with and under such powers, provisos, conditions, restrictions, and limitations as plaintiff *Catherine Sockett*, by herself alone, whether sole or covert, and notwithstanding her present coverture, should at any time or times during the term of her natural life, by her last will and testament in writing, or any writing purporting to be her last will and testament (2), to be by her signed and published in the presence of, and attested by two or more credible witnesses, (which will, &c. the plaintiff *Catherine*, was by that indenture, and by plaintiff *Henry Sockett*, authorised to make) should in that behalf give, bequeath, direct, or appoint, and for want of, and in case no such gift, &c. should be made thereof, or not extending to the whole of plaintiff *Catherine Sockett*'s estate or interest therein, then as to so much thereof as should not be so given, &c. in trust, to transfer the same to the executors or administrators of plaintiff *Catherine Sockett*, for their own use and benefit.

Money invested in trust for a married woman, to pay her the interest for life, to her separate use, and after her decease, to such person, and subject to such powers, &c. as she should by any instrument in writing from time to time or by will appoint (during her present coverture) she cannot dispose of the principal at once, by deed, but by a revocable act only. (1)

[\*484].

(1) Mr. Roper, in his late elaborate work on the Law of Husband and Wife, observes (2 vol. pp. 210. 215, &c.) that, although the decision in the principal case has been disputed, the decree may well be supported upon the principles acknowledged in *Reid v. Shergold* (10 Ves. 370. 380.), and *Anderson v. Dawson* (15 Ves. 532.); namely, the distinction between a feme covert having a mere partial interest with a power of appointment to be exercised within precise limits, and the case of her having substantially the absolute interest in any fund, though it may be limited in the form of a power. Mr. Roper observes (2 vol. 216.) that, in the present case, the power did not authorise an appointment by any instrument except by will, or a writing purporting to be a will; and that this observation [attending to the above distinction] seems to obviate Lord Eldon's difficulty upon it, as expressed in *Sperling v. Rochfort*, 8 Ves. 176. Upon the subject of a wife's rights and her disposition in respect of her separate property, see the Editor's notes on *Hulme v. Tenant*, ante, 1 vol. 16., *Fettiplace v. Gorges*, 3 vol. 8., *Pybus v. Smith*, ibid. 340., and *Ellis v. Atkinson*, ibid. 565.

(2) See the observations referred to in note (1) ante.



1793.

SOCKETT  
vs.  
WRAY.

The bill further stated, that ever since the execution of the settlement, the interest had been regularly paid to the plaintiff *Catherine*, according to the terms thereof, and that the plaintiffs having occasion for a sum of money, and plaintiff *Catherine* having become desirous of having the Bank annuities sold, and the money paid to the plaintiffs, applied to the trustees to sell the same, being ready to acquit and discharge the trustees from all future claims, but the defendant refused, without an indemnity, on which account the bill was filed, insisting that the plaintiff *Catherine Sockett* being entitled to the dividends for life, to her sole and separate use, and to dispose of the capital in such manner as she should think fit, the trustees could not be prejudiced by transferring the same; and praying that the defendants, the trustees, might be decreed to sell the funds, and to pay the money to *Henry Sockett*, the plaintiff *Catherine* being willing to appear in court and consent to the same.

[ \*485 ]

[\*] The defendants by their answer admitted the trusts as above, and submitted by the terms thereof, they should not be satisfied in selling the fund, but submitted to act as the Court should direct.

The question was argued before his Honor the *Master of the Rolls*; Mr. *Graham* and Mr. *Hart* for the plaintiffs, and by Mr. *Short* for the defendants, the trustees; and this day his Honor gave judgment to the following effect.

*Master of the Rolls* — (After stating the trusts of the deed.) The effect of the deed is this, in consequence of an agreement *before marriage*, the money is put into the hands of trustees, to pay the dividends to the wife, or as she shall appoint, for life, and after her decease according to her appointment, by will, and the question is, whether under such a trust it is competent to the wife to waive the benefit of the deed, and to give the whole capital away at once, during her life. At the opening, it struck me that it was impossible to be done; a case in point was then cited. — But notwithstanding that case, and the respect I have for the noble Lord who decided it, I cannot conform to it.

The case is *Newman v. Cartoney*, which came on 24th April, 1771, and is in the Register's book for 1770, B. 275. (cited *ante*, vol. iii. p. 346. in the note, and p. 568.) It came on by consent and therefore is likely to have been acquiesced in, but it is my duty to exercise my own judgment on the subject.

The other cases that were cited, were *Hulme v. Tenant*, (*ante*, vol. i. p. 16.) *Pybus v. Smith*, (*ante*, vol. iii. p. 340.) *Ellis v. Atkinson*, (*ibid.* p. 565.)

In the case of *Hulme v. Tenant*, it appears that Lord *Bathurst* was of a different opinion from Lord *Thurlow*. — From that case I extract this principle, that a married woman may in this court be considered as to all her property as a feme sole, I say as to her property, because no contract can be entered into by her to affect her person, the remedy must be against her property, with respect to her person she is protected. Lord *Thurlow* says there, that the Court cannot exercise any power as to her person, but if she affects to enter into any contract which would make her person liable, if she was a feme sole it shall operate upon [\*] her property in the hands of her trustees; Lord *Bathurst* in that case dismissed the bill, but Lord *Thurlow* thought the plaintiff might make the contract available against the property of the wife, and I am very much inclined to hold, that where a power is given to a married woman, to act on her property, she is so far to be considered as a feme sole. (3)

[ \*486 ]

(3) This is by far too strong. See Lord *Eldon* C.'s observations referred to in the Editor's note on *Hulme v. Tenant*, *ante*, 1 vol. 16.

*Norton v. Turvill*, 2 P. Wms. 144. bears much more analogy to the present case than *Hulme v. Tenant*.

*Ellis v. Atkinson* was prior in time to *Pybus v. Smith*.

In *Ellis v. Atkinson*, Lord Thurlow had great difficulty in getting over the words *from time to time*.<sup>(4)</sup>

In *Pybus v. Smith* (5), Lord Thurlow expressly laid it down, that if it was the intention of a parent to give a provision to a child in such a way that she could not alienate it, he might do so, but he thought the intention must be in express terms.

If of a parent, it must be so of any other person giving property.

But if the parent or other person has given a power without restraining it, the Court will act upon the property.

Then what is the meaning of the power under this deed?

The meaning is this: that the wife should have the whole interest for life, with a power to dispose of the whole so as she did that *by a revocable act*: but she must reserve a power to act upon the property in future, if she thought fit so to do.

A married woman is in a different state from an infant, an infant has no disposing mind; with respect to a married woman, the law says, she has a disposing mind, but not a disposing power. This Court gives her a disposing power, if the power in the settlement limits it so.

In this case she is to do it (6) "by any note or notes, instrument or instruments, writing or writings." The omission of the words "deed or deeds" which are usually inserted in such powers, is a [\*] strong guard, and shews she was only to do it by a revocable act, and has no right to give but under the power.<sup>(7)</sup>

It is admitted that if the gift in default of appointment, was to persons expressly named, she could not dispose of the whole at once, but it is argued to be different, when it is given to her executors or administrators.

In *Norton v. Turvill*, the disposing power was not confined to being executed by a will. The question there was, as to the execution by bond. The Master of the Rolls was of opinion, that though as a bond it was void, it was a good disposition against persons claiming under her will, and that where a person having a disposing power, gives a bond, it is binding on her personal property.

It is argued, that supposing her a feme sole, she could do the act; there the single woman can act, because she can bind herself personally, but is there any contract that this married woman could enter into, that would bind her after the termination of the coverture? If she gave a bond, could she be sued upon it after the coverture? Certainly not. A man or a single woman, as they can bind themselves personally, may bind their executors and administrators, but it is not so of a married woman.

As to the interest, she was to have it for life, *but as to the principal, she could only dispose of it from time to time, by a revocable act*; I should go too far in this case if I held it to be disposable any way but by will.

(4) See the Editor's notes upon it, *antea*, 3 vol. 565.

(5) See the Editor's notes upon it, *antea*, 3 vol. 340.

(6) There must be some mistake here. *Her power was not to make a general disposition "by any note or notes, &c.; that mode of disposition extended only to the dividends and interest. When the corpus was to be disposed of, the power prescribed it to be done by will, or writing testamentary. See also note (1) antea.*

(7) Lord Colchester's notes express this part of the judgment thus: "The leaving out the word 'deed' is as strong to show that she should appoint by will only, as if there had been an express clause to that effect. This is very beneficial to a wife, because she may survive the husband, and then she would be entitled to dispose of the fund in her lifetime."

1794.

SOCKETT  
against  
WAT.

I subscribe to *Norton v. Turville*, but this is a different case, therefore notwithstanding the cases of *Newman v. Cartoney*, *Ellis v. Atkinson*, and *Pybus v. Smith*, I think she could not dispose of it by deed.

There is something remarkable in this case, that the restraint is only during her *present* coverture. If she survived her present husband, the restriction was thought unnecessary, therefore during the life of her present husband she can only dispose of it by will.

Bill dismissed.

[ \*488 ]

Lincoln's Inn  
Hall, 17th Jan.

[\*] HUTCHINSON against WILSON and Others.

(Reg. Lib. 1793. A. fol. 151.)

A creditor by  
bond cannot  
stand his own  
insurer, and  
charge the  
premium to his  
debtor.

THE defendants, who were tradesmen in London, supplied *Snow and Shepherd*, who were the captain and purser of the *Talbot* East Indiaman, with goods, for the purpose of making part of their investment, the plaintiff *Hutchinson*, with one *Auther*, since deceased, became bound with *Snow* and *Shepherd*, in a bond to the amount of 1036*l.* to the defendants, for securing the payment. The goods upon the whole were to a much larger amount. The defendants actually insured only 800*l.* but charged in their account 165*l.* as paid for the insurance of 2350*l.* from London to the *East Indies*, to cover the bonds.

At the hearing it had been referred to the Master to take an account of the sums due to the defendants; in taking which account, he had admitted this charge of 165*l.* the defendants insisted, that as to that sum they stood their own insurers.

And upon exceptions taken to the Master's report, the question was, whether the defendants ought to have been allowed this charge.

Mr. Attorney General, Mr. Lloyd, and Mr. King for the plaintiff, insisted, that it ought not to have been allowed, and that there was not any pretence for saying that the defendants stood their own insurers, that they could not insure the bond, *Lowry v. Bourdieu*, Dougl. 468. Therefore if they had effected a policy it would have been void. But here there was no insurance made, *Smith v. Lascelles*, 2 Term Rep. 178. They admitted, that where a correspondent abroad orders his agent here to make an insurance, and he does not, he is liable in an action to the amount of the insurance, but there was no evidence in this case before the Master, to shew any order from *Snow* and *Shepherd*. If persons could stand their own insurers, it would be a constant way of evading the stamp duties. By making the insurance on the 800*l.* they have pronounced judgment against themselves as to the other part, as that shews what the agreement was, what remedy would *Snow* and *Shepherd* have had in case of a loss? There [\*] was no legal instrument, no stamped policy, nor any way to shew that the defendants had themselves insured the goods.

[ \*489 ]

Mr. Solicitor General and Mr. Mansfield for the defendants. — As to the last objection, it is an extraordinary one, as the charge of 165*l.* stands on the face of the account, and would be evidence of the insurance. At the time this was done, which was before the case of *Lowry v. Bourdieu*, it was considered as a fair transaction, and was continually done in the city of London, for creditors to stand their own insurers. After such transactions are over, and the money paid, it has been repeatedly decided that the money cannot be brought back, and here the defendants having taken the bond, it is the same thing as if they had been

been paid the 165*l*. If the defendant had underwritten the policy, they would have been the best insurers, for *Snow* and *Shepherd*, as being their creditors, and the policy having been effected as far as the 800*l*. the revenue is not defrauded, and only wants the names of the *Wilsons* to be subscribed to it, to be perfectly regular. The Master has therefore done right.

Lord *Chancellor*. — Where a man undertakes to insure for another, and does not, he will be liable in an action, (1) and the damages will be what the party would have recovered from the insurers; but where the insurance is not made, he can never charge for it. There is no principle to suffer a man to avail himself of an instrument he has never made.

Exception allowed.

(1) See *Harding v. Carter*, Park on Insurance, p. 4.

1793.

HUTCHINSON  
against  
WILSON.

[\*] HILARY TERM,

[\*490]

(34 Geo. 3. 1794.)

STAPLETON against PALMER and Others.

(Reg. Lib. 1793. B. fol. 181. b.)

24th Jan.

JOEL SAVILE of the island of *Jamaica*, esq. seised and possessed of considerable real and personal estate, made his will dated June 9th, 1786, and thereby, after several legacies, ordered "that his executors should sell and dispose of his estates, &c. three years after his decease, and all the rest, residue, and remainder of his estates real or personal, he gave to his sister *Elizabeth Grange*, and all the children of her body lawfully begotten, to be divided by his executors among all such of them as may be living at the time the dividends take place, share and share alike," and appointed two of the defendants, *John* and *James Palmer* executors.


A residue to be divided by executors at an indefinite term vests at the death of the testator, [unless an intention is manifest to the contrary upon the face of the instrument. (1)]

The testator died 6th July 1787, leaving his sister *Elizabeth* surviving

(1) This seems the settled doctrine, after the most mature consideration of the most able judges, however they may have differed in collecting such intention from any particular instrument. It will be seen by the Lord *Chancellor's* observations in the present case, that the agreement of the parties precluded it from being adduced as a determination of the Court upon the instrument before it: and this has been frequently noticed in later cases. Vide 6 Ves. 169., 8 Ves. 557, &c. That the general doctrine is as above, see *Hutchinson v. Mannington* (cited in Mr. *Brown's* note in next page), as per Lord *Eldon C.*, in *Sirwell v. Bernard*, 6 Ves. 536., and *Gaskell v. Harman*, on the appeal, 11 Ves. 497, 498. See that case from p. 499. *ibid*.

Lord *Eldon* thus expresses the rule, at p. 498. *ibid*.: "Considering the variety of personal estate, the enquiry would be endless as to each and every part, when by proper diligence it could be got in. The Court, therefore, has said the best construction is, generally to consider the interest vested and in hand, though strictly not collected for the purpose of enjoyment, as between the particular interests and the capital: and if that is wise, the Court will not conjecture in favour of an intention against the general rule. It must, however, be distinctly understood that if the intention is clearly expressed, it must be carried into execution."

him,

1794.  
  
 STAPLETON  
 against  
 PALMER

[\*491]

him, who had four children then living, *Sarah* the wife of the plaintiff *Stapleton*, who is since deceased, and three of the other defendants, and *Elizabeth* has not had any child born since.

The executors did not sell the estates within the three years after the death of the testator, but on the 9th *July*, 1790, the plaintiff and his then wife, and the defendants, the other children of *Elizabeth*, and the husband of such of them as were married, executed a letter of attorney, reciting the clause in the testator's will, by which he disposed of the residue, by which they authorised *Richard Glade* Esq. to receive from the executors and all other persons, such sums of money as should be due to them by virtue of the said will, and the said *Richard Glade* applied to the executors to sell the estate, and settle their accounts; in [\*] consequence of which the executors exposed the estate to sale on the 4th of *August*, 1791, and sold the same for 11,600*l.* payable by instalments, and the purchaser paid immediately 1160*l.* by way of deposit. But several difficulties falling in the way, the conveyances were not executed by the time the second instalment was made payable, nor was the same paid, but the difficulties were afterwards removed, and the conveyances prepared, but not executed, when on the 14th *May*, 1792, the plaintiff *Stapleton's* wife died, and he obtained administration, and alterations were made in the conveyances, shewing that he was a party as administrator of his wife.

The defendant, who had married *Hester George*, one of the daughters of the testator's sister, *Elizabeth*, objected to joining in the conveyance, unless a fourth part of the purchase-money was paid to him in right of his wife, he insisting that by the death of the plaintiff's wife, before the money was divided, the same became divisible in four parts, among *Elizabeth* and her three surviving children, whereupon the parties came to an agreement, that the money should be laid out in the funds, subject to the question as to the rights of the parties, and the conveyances were executed, and the present bill filed to ascertain the rights of the several parties, on which the plaintiff claimed one-fifth part of the purchase-money, as having become payable to her in her life-time.

The defendants by their answer insisted, that *Sarah Stapleton* the plaintiff's late wife, was only entitled to a contingent interest in the fifth part of the purchase-money, and other residuary estates of the testator, dependant upon her living to the time of the distribution of the same.

Mr. Attorney General, Mr. Solicitor General and Mr. Hollist. — This must be considered as vested at the death of the testator. There was a similar case before Lord Thurlow, of *Hutchinson v. Manningham* †

† *HUTCHINSON v. MANNINGHAM*. (2) — *John Hutchinson*, jun. being in the *East Indies*, and his friends and family in *England*, made his will in *January*, 1781, by which he gave several legacies to different legatees, with this clause, "but in case he shall die before he shall receive the same, then I give the same to my brothers and sisters," he then gave the residue to his father, *John Hutchinson*, with a similar clause, "but in case of the death of my father, before he shall have received it, I give the same to my brothers and sisters, and their children, share and share alike." — The testator died soon after making the will.

Several payments had been made to such of the legatees as were since dead, but they had not been paid the whole of their legacies, the father died in 1784, without having received any part of the residue.

The plaintiffs were a surviving brother, a sister with her husband, and the husband of a deceased sister of the testator, who claimed such part of the legacies as had not been paid

(2) Reported 1 Ves. jun. 366. See upon it, 6 Ves. 536. note, 11 Ves. 497., the Editor's next note, *et per* Sir W. Grant M. R., 6 Ves. 169., and in *Bernard v. Montagu*, 1 Merivale, 432.

(reported

(reported 1 Vesey jun. 866., by the name of *Hutchinson v. Mannington*), where he held, that no time being named [\*] within which the money was to be remitted, the legacy vested at the death of the testator, so the estates being directed to be sold, not having been sold within the three years, must be considered as being sold immediately. The direction not being imperative upon the trustees, they might have sold at any time. Had they been all dead before the sale, their interests would have been transmissible. The testator could not mean in that case to die intestate; Lord *Cowper's* rule must prevail, that the persons living at the death must take, Lord *Bindon v. The Earl of Suffolk*, 1 Wms. 96., *Stringer v. Philips*, 1 Eq. Cas. Abr. 292. The parties here joining in proposals to sell have ascertained their shares. In the case of *Falkner v. Hollingsworth*, an estate directed generally to be, was considered as sold at the death.

Mr. *Graham* for the defendants, admitted, that if the sale had been deferred by accident, that could not have affected the parties, but insisted that the instalments would be divisible, as they became payable under the words of this will.

[\*] Lord *Chancellor*.—The facts of the case have put the point out of all question. Their all joining in the direction as to the sale fixed their shares. (4)

paid to the deceased legatees before their deaths, and the whole of the residue. The defendants were the executors of the testator, and the executor of the deceased father.

Mr. *Solicitor General* for the plaintiffs, contended, that the testator's intention was to give this property to his relations, but not to give them vested interests till they should actually receive the money. He considered the time necessary to collect and remit the property, and that although they might survive him, they might die before the money could be conveyed to *England*, and in that case he meant other hands to receive it. Suppose this was the case of a real estate, to be sold, and the money paid to *A.* but if he died before the sale, then to *B.* that gift over would be good.

But Lord *Chancellor* thought this was too general, no time being limited, the testator certainly had intended it not to vest immediately, but that there should be time to transmit it; there was certainly time to transmit it, but he has specified no time; if he had, as a year, in reference to the time given by law to an executor for payment, it would have been good, but as it is, the legacies vested at his death. In the case stated, of a real estate to be sold no caprice or dilatoriness of the trustee could affect the gift, the estate being directed to be sold would be considered as sold, as what is to be done is considered as done, and it would vest at the death of the testator.

The cause repeatedly stood over, but the final decree turned upon an agreement between the parties. (3)

(3) The report in 1 Ves. jun., 368. is to the same effect; but it appears that the agreement related to another subject; and that Lord *Thurlow* did determine, and meant to determine the point of law in that case, agreeably to the Editor's marginal note of the principal case, *ut supra*. See the note in *Sitwell v. Bernard*, 6 Ves. 536., and the observations of Lord *Eldon*, C. in *Gaskell v. Harman*, 11 Ves. 497. His Lordship, though approving the sale, thought it inapplicable to that particular case; and seems to think so still, for his Lordship is reported to say, "In the case of *Hutchinson v. Mannington*, I admit I thought the meaning of those words was 'what they shall have received,' and I thought so even after the decision. The use I have since made of that case is as an authority, that if the words will admit of not imputing to the testator such an intention, it shall not be imputed to him. If that intention can be supposed, it was natural in that case. The natural construction of that will was, if the legatee should die before the property should be actually remitted to him. But Lord *Thurlow* looking to those considerations, which he expressed with considerable anxiety, the more perhaps as he perceived that many of the bar did not go along with him, thought himself at liberty to put a construction upon the will, that by possibility might be put upon it: [that is to say, that the testator could never have meant the parties should wait the result of an inquiry as to when every part of it could have been received.]"

(4) See note (1) *antea*, 6 Ves. 169., 8 Ves. 557. It appears from Reg. Lib. that the Court declared that the residue of the testator's personal estate, and the produce and profits of the plantations and premises before the sale thereof, and also the money arising from the sale thereof, ought to be divided into five equal parts, &c. R. L., 184.

1794,

STAPLETON  
against  
PALMER.  
[\*492]

[\*493]

1794.

## SMITH and Others against STRONG and Others.

(Reg. Lib. 1793. B. fol. 150. b.)

25th Jan.

A father by will gives the residue to his three natural children (1) equally. He afterwards gives two of them (daughters) marriage portions, they shall not be held to be a satisfaction *pro tanto*. (2)

THESE were two petitions of the several plaintiffs in the cause.

They stated that *Thomas Armstrong*, the testator, seized of freehold, copyhold and leasehold estates, made his will, bearing date 29th August, 1785, and thereby, after making specific and equal bequests to the petitioners, *Thomas Smith* and the plaintiffs *Mary* and *Ann* (the petitioners in the other petition) then all infants and unmarried, who were his three natural children (1), he directed that his executor should sell all his estates, and after payment of debts, &c., should lay out the money arising from such sale in the purchase of long annuities, to accumulate till the petitioner should attain twenty-one, when the same should be transferred and paid to the petitioner, and the said *Mary* and *Ann Smith*, share and share alike, and made the defendants executors.

After the testator made his will, he, upon the marriage of his daughter *Ann Smith*, with the plaintiff *Richard Wilkinson*, paid him as a marriage portion with the said *Ann* 1500*l.*, and afterwards, upon the marriage of his daughter *Mary Smith*, with the plaintiff, *George Coleman* the testator paid him a portion of 1000*l.*, but never advanced the plaintiff *John Smith* any thing.

The petitioners *Richard Wilkinson* and *Ann* his wife, and *George Coleman* and *Mary* his wife prayed an equal division of the residue, but the petitioner *Thomas Smith* suggested, that the testator meant to make an equal distribution of his fortune among the three children, and therefore that the petitioners *Ann* and *Mary* ought to abate so much as they had received.

Mr. Attorney General, Mr. Mansfield and Mr. Alexander for the petitioners *Ann* and *Mary*, and their husbands, contended, that the advancement could not be considered as satisfactions, in the case of a residue: that that construction never could hold, where the [\*] gift was of a residue. The principle of satisfaction was, that the person standing in *loco parentis*, having made a provision to a certain extent, has completed that intention; but this does not apply to a residue, which is uncertain.— They cited *Farnham v. Philips*, 2 Atk. 215.; *Rickman v. Morgan* (ante, vol. i. p. 63. and vol. ii. p. 394.) which was the case of a provision by settlement.

Mr. Solicitor General and Mr. King for the petitioner *Thomas*, admitted the case of *Farnham v. Philips* was a strong case, but that Lord Hardwicke had afterwards expressed some doubts how far the rule applied to the case of a residue, *Watson v. The Earl of Lincoln*, Amb. 325. There are many other cases, where it has been doubted whether a residue is not to go in satisfaction, they are all enumerated in the judgment in *Rickman* and *Morgan*; the Court leans against double portions, which would lie in this case, if it is not considered as an advancement, in case of intestacy it would be a satisfaction *pro tanto*, and must have been brought into hotchpot.

Lord Chancellor. — I cannot draw any conclusion from the case of

(1) In the case of illegitimate children, the author of the bounty being considered only in the light of a stranger, an instrument is often held no satisfaction as to such objects, which in a case between parents and children generally, would certainly be held a satisfaction. See *Ex parte Dubost*, 18 Ves. 140., and *Wetherby v. Dixon*, Cooper Ch. Ca. 281.

(2) See the Editor's note and references to *Warren v. Warren*, ante, 1 vol. 305., and *Rickman v. Morgan*, and *Pearson v. Morgan*, ante, 1 vol. 63., 2 vol. 388. & 394., with the references *passim*.

intestacy,

intestacy, the construction of the law there is, that the children shall all take equally. With respect to this will, the testator having absolute power over the fund, he has given it to his children (3) equally; by having before made a provision he has made no reference to it in the will. It is very difficult to apply the rule to an uncertain residue. It was certainly the opinion of Lord *Hardwicke* in the case in *Ambler*, that the uncertainty of the residue made the difference.

His Lordship therefore ordered the residue to be equally divided.

(3) *Illegitimate* children. See note (1) *antea*.

1794.

*Smith*  
against  
*Strong*.

FORDYCE & al' against FORD.

(Reg. Lib. 1793. A. fol. 112. b.)

4th & 5th Feb.

Master of the  
Rolls for Lord  
Chancellor.

MR. *Mansfield*, supported by Mr. *Harvey*, moved for an injunction to restrain the defendant from proceeding in the action commenced by him against the plaintiff *Edward [\*] Smith*, (the auctioneer) and that the injunction may extend to stay trial of the action on the following state of facts, as taken from the bill and answer.

The plaintiffs Dr. *Fordyce* and others being possessed of a residue of a term of 2000 years in a leasehold house and premises called *Belvidere*, in the county of *Southampton*, and also entitled to the fee-simple and inheritance of a freehold close adjoining, employed the plaintiff, *Smith*, to sell the same, with the furniture and paintings in the house, and a copyhold estate also, belonging to them, and the plaintiff *Smith* prepared and circulated particulars to the purport following, "A desirable and singularly beautiful freehold estate, with a leasehold adjoining, held for a term of 2000 years. The estate contains 90 acres more or less, of rich arable meadow and pasture land (part freehold and part leasehold) with further description of the garden, &c. The furniture, with several capital paintings, by eminent masters, which will be included with the mansion-house, in one lot." And the conditions of the sale were, that the purchaser should pay down a deposit of 25*l. per cent.* and sign an agreement for payment of the remainder, on or before the 30th July, 1793, on having a good title, and should have proper conveyances, on payment of the residue of the purchase-money.

The premises were put up to sale by the plaintiff *Smith*, 25th June, 1793, at *Garraway's* Coffee-house, and the plaintiff, *Smith*, before he proceeded to the sale, informed the company that the premises were by mistake described to consist of 90 acres, for that they consisted only of 70 acres, and then he proceeded to sell the same, when after several biddings, the defendant, Sir *Francis Ford*, was declared the purchaser, at the price of 4900*l.* and the defendant paid 1225*l.* by way of deposit, and signed an agreement to complete the purchase.

Upon the 8th of July, 1793, the plaintiff's solicitor delivered to the defendant's solicitor, an abstract of the plaintiff's title to the premises, by which it appeared, that there were only seven acres of freehold, and

Injunction granted to stay action against the auctioneer for the deposit, although the estate sold was represented as freehold with leasehold adjoining, and turned out to be almost all leasehold (1) and although there had been great delay in making out the plaintiff's title. (2)

[\*495]

(1) See the Editor's notes and references on *Shirley v. Stratton*, *antea*, 1 vol. 440., and Mr. *Sugden's* valuable work on *Vend. & Purch.* 245. *et seq.* (5th edition.)

(2) But it was upon the terms of paying the whole of the purchase-money into Court. R. L. *et postea*, 498. Upon the subject of delay in these cases, *vide Lloyd v. Collet*, *antea*, 469. *et seq.* with the Editor's notes.

upon



1794.

FORDYCK  
against  
FORD.

[ \*496 ]

upon laying the abstract before counsel, the defendant was advised, that the abstract did not contain any sufficient title to the leasehold, nor any title whatsoever to the freehold, prior to the year 1783. The defendant's solicitor, 27th July, sent [\*] the abstract back to the plaintiff's solicitor, with observations on the title, in consequence of which the plaintiff's solicitor made additions to the abstract, as to the leasehold part of the estate, and, upon the 8th of August, sent the same to the defendant's solicitor, with a letter, by which it appeared that other papers were still to be obtained. A correspondence commenced between the solicitors, which lasted till 25th September, about which time the plaintiff's solicitor, by a note, stated that he believed it would be very difficult, if not impracticable, to obtain a prior title to the seven acres, viz. the freehold part of the estate.

In Michaelmas Vacation the plaintiffs filed their bill for a specific performance. The defendant brought an action against the auctioneer for the deposit, and by his answer, 22d January, 1794, stated as his defence, that he wanted the estate for a residence for the last summer, and as the plaintiffs had not made out a title within a reasonable time, insisted he was not bound to go on with the purchase.

The counsel for the plaintiff, cited *Gibson v. Patterson*, 1 Atk. 12.; *Pincke v. Curtis*, ante, p. 329, and contended, that the defendant here having objected to the estate, as consisting principally of leasehold, had thought that circumstance immaterial, and that the delay in making out the title was not a sufficient ground to dissolve the contract.

Mr. Attorney General for the defendant relied on the case of *Lloyd v. Collet*, ante, p. 469.

*The Master of the Rolls*, only observed, that he should grant the injunction, and give his reasons on the morrow.

*The Master of the Rolls* this day gave his opinion upon the motion.

He stated the particulars. — The estate was represented to be a freehold estate with leasehold adjoining — he stated also the condition of sale — It did not appear by the particular how much of the estate was freehold, and how much leasehold. — The purchase was to be completed by the 30th July.

[ \*497 ]

[\*] An abstract was delivered the 8th July, by which it appeared that the estate should rather have been called a leasehold estate, with a freehold adjoining, for of the 70 acres, 62 were leasehold and only eight freehold.

If Sir Francis Ford had made that objection, I should have thought the purchase ought not to be carried into execution.

But the abstract was delivered the 8th July, and no objection of that kind was made — so that the purchaser acquiesced.

Then no great delay is attributable to the seller's solicitor. The abstract was returned with observations — particularly that as to the eight acres, on the 23d of August.

There is a letter from the purchaser's solicitor, the 19th of September.

25th September the deeds are delivered and every difficulty cleared up — Then Sir Francis Ford refused to go on.

If I was to grant the injunction, it would be to prevent Sir Francis Ford endeavouring at law to set the transaction aside.

The old doctrine of this court, is represented, as being that wherever there was a contract entered into, the Court would carry it into execution. — This doctrine is supported by the case of *Gibson v. Patterson*, (1 Atk. 12.) from whence the rule has been drawn, that no negligence ever so gross would be an excuse for not performing the contract. It is impossible Lord Hardwicke should have used the language that is attributed to him by the reporter in that case. It appeared by a MSS. note

cited of it by Lord Chancellor, lately, in a case of *Lloyd v. Collet*, [*ante*, p. 469.] that there was no gross negligence in the case. (3)

But suppose the Court had been so loose in cases of this sort: the rule certainly now is, that where in a contract either party has been guilty of gross negligence, the Court will not lend its assistance to the completion of the contract.

[\*] Then the question is, how the rule applies to this case.—Whether the seller's solicitor has been guilty of any gross negligence or of misrepresentation.

If the purchaser had made the objection as to its being represented as freehold with leasehold adjoining — and turning out leasehold, I should not have thought he ought to be bound — but he knew it on the 8th of July, and made no such objection, therefore it becomes a question, whether that ever entered into his intention.

I hope it will not be gathered from hence, that a man is to enter into a contract, and think that he is to have his own time to make out his title.

It is now set up, that the defendant *wanted this estate for his last summer's residence*, and that *consequently no title being made till September*, it was of no use to him.

I think this is a case where the plaintiff may have a right to compel the performance, therefore on bringing the money into court the injunction must go.

In *Lloyd v. Collet*, (4) last Michaelmas Term, the contract was on the 2d February, on the 17th March, the seller was ready to make out her title. The purchaser made no objection to the title, but said, he had no money, and if he meant to enforce the contract he would run off to Scotland. (4)

(3) See the mistake as to *Gibson v. Patterson*. Noticed also *ante*, 469. 471. notes; agreeably to 4 Ves. 689, 690.

(4) Mr. Brown has made a mistake here. It was the case of *Gibson v. Patterson*, stated by Lord Loughborough C., in *Lloyd v. Collet*, to correct the report 1 Atk. 12. *Vide ante*, 469. 471. Editor's notes, and 4 Ves. 689, 690. note.

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FORAYON  
against  
FORAY

[ \*498 ]

## ANTH [ANTT] against SAMBOURNE.

(Reg. Lib. 1793. A. fol. 131. b.)

Master of the  
Rolls for Lord  
Chancellor.

8th &amp; 12th Feb.

THE plaintiff had entered into a contract with the defendant, to build her a house, afterwards the terms of the contract were varied from; and additions made to the original plan, and the defendant brought an action at law against the plaintiff here for the sum originally contracted for, and for the additions. The action being ready for trial, the defendant [\*] moved to have the trial put off, on account of the absence of a material witness, and upon showing cause, the rule was granted, on the defendant then (plaintiff) would not bring error for delay, or file bill for injunction, a bad plea (1), but the Court after such an agreement will not grant an injunction as to that suit. (2)

Plea to a bill  
for a discovery  
as to a specific  
performance,  
and for an  
injunction.  
The plea of an  
agreement at  
law, that the  
defendant had  
plea (1), but

[ \*499 ]

(1) See *Thompson v. Charnock*, 8 T. R. 159., and notes to *Halfhide v. Fenning*, *ante*, 2 vol. 336.

(2) See Beames's Elem. Pleas, 251, 252., with the references in the notes; and *Michell v. Harris*, *ante*, 311., with the Editor's notes to it and to *Halfhide v. Fenning*, *ante*, 2 vol. 336, 337. See further, as to the principal case, *per Lord Eldon C.*, in *Street v. Rigby*, 6 Ves. 819.; and see *Collis v. Swayne*, *ante*, 480.

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ANTH  
against  
SAMBORNE.

defendant's undertaking not to bring a writ of error for delay, or to file a bill in equity for an injunction.

The plaintiff notwithstanding filed this bill for a discovery, whether the defendant had built the house according to the contract for a specific performance of the contract, and also for an injunction.

Defendant pleaded the agreement at law to the whole bill.

Mr. *Attorney General* and Mr. *Ray* contended that this plea to the whole bill was bad, for the plaintiff had a right to a discovery, whether the house was built according to the contract, and to have a specific performance. She had also the right to have the aid of this Court in an action at law. That the plea being bad in this respect was bad in the whole.

Mr. *Lloyd* in support of the plea, argued that it was good, that the difference between a plea and demurrer, is that a plea may be good in part and bad in part, whereas a demurrer if bad in part is wholly so. That a party agreeing at law not to file a bill, it would be improper to suffer him so to do, but the only way to stop him is by a plea. If the court of law made a rule in consequence of such an agreement to stay proceedings in this court, this Court would not go on. The agreement operates as a release of the right to bring a bill. The case of *Halfhide v. Fenning* (*ante*, vol. ii. p. 336.) shews a similar plea may be allowed. It will be said, that the case of *Michell v. Harris* (*ante*, p. 311.) over-ruled that case, but it was decided on different grounds.

*The Master of the Rolls* said it was perfectly clear the plea was a bad one. But the Court, though it would not restrain the plaintiff from filing a bill for a discovery, or specific performance, would not suffer him after such an agreement to come for an injunction.(3)

[ \*500 ]

But there having been a motion at law on the part of the defendant, for an attachment against the plaintiff, for a breach of the undertaking, against which, cause was to be shewn on [\*] *Tuesday* next, his Honor ordered the motion to stand over till *Wednesday*, when he would make some order upon it.

It accordingly came on upon the last day of the term, [the 12th] when the Court of King's Bench having discharged the rule for an attachment, but ordered the defendant to put in his answer by *Saturday*, in order to be read at the trial, and in the meantime, to pay the money into that court, his Honor ordered the plea to be over-ruled.(4)

(3) But see *Brandon v. Sands*, 2 Ves. jun. 514., where it was held that a party being entitled to discovery, in a suit framed for that purpose, was also entitled to the injunction which he prayed as a consequence of it; holding that praying for an injunction, and such further and other relief as the Court should see fit, did not alter the nature of the suit.

(4) And that the defendant should put in his answer by the ensuing *Monday*, be undertaking so to do, and not to try the cause till *Thursday*. R. L.

### CARUTHERS and Others against CARUTHERS, Widow.

*Rolls*, 15th &  
18th Feb.

(Reg. Lib. 1793. A. fol. 303. b.)

By the settle-  
ment made on  
the marriage of

THE bill was filed by *Edward Palling Caruthers* and others, infants, against *Grace Caruthers*, widow, their mother, and it stated that a female infant, an estate was settled on the husband's mother, for life, remainder to the husband for life, remainder to the wife for life, with remainders over, in bar of dower. This settlement will not bind the wife in regard the mother might (which she did) survive the husband; the wife may therefore elect to take the provision under the settlement, or her dower and free bench. (1)

(1) See note (1) next page.

the

the plaintiffs about the year 1791, filed their original bill against the defendant, the widow of *William Caruthers*, deceased, and thereby stated, that the said *William Caruthers* was at the time of his death seised in fee, as of an estate of inheritance of freehold and copyhold estates, in the parish of *Painswick com. Gloucester*, and also possessed of a considerable personal estate, and in *July*, 1790, died intestate, leaving the defendant his widow, and the plaintiff *Edward Palling Caruthers*, his only son and heir at law, and the other plaintiffs, his seven daughters surviving him, and upon his death his freehold and copyhold estate descended on the plaintiff, his son, subject to the defendant's right of dower and free bench, and his personal estate became divisible among the defendants and plaintiffs, according to the statute of Distributions, that the defendant had obtained letters of administration, and possessed herself of the intestate's personal property, to the amount of 21,000*l.*, and had paid a portion of 1750*l.* for the share of plaintiff *Mary*, one of the daughters, who had married the late plaintiff *Nathaniel Peach Wathen*. The bill prayed an account, and that the plaintiff's respective shares of the residue might be ascertained and laid out in the funds for their benefit, that the rents and profits of the real estates might be laid out for the benefit of the plaintiff *Edward Palling Caruthers*, for a guardian or guardians, and a receiver to be appointed, and allowances for maintenance.

[\*] The defendant, by her answer, claimed her right to dower, in the freehold and free bench, in the copyhold estates, and also her distributive share of the personal estate.

The cause came on to be heard in the year 1791, when a decree was made for an account, and it was (*int. al.*) ordered that the defendant should be at liberty to retain *one-third* part of the clear *residue* of the intestate's personal estate, and to pay the other two-thirds into the Bank, to be placed to the credit of this cause; and it was further ordered, that the Master to whom the cause stood referred, should take an account of the rents and profits of the real estate come to the hands of the defendant, and should enquire and state to the Court what freehold and copyhold estates the intestate died possessed of, and in what parts of the freehold and copyhold estates the defendant was entitled to dower and free bench, and to state the custom of the manors of which the copyholds were holden; and other necessary directions were given.

The present bill then stated, that before any further proceedings in the cause were had, the plaintiffs discovered, that by an indenture of settlement made previous to the intermarriage of the intestate, with the defendant, and bearing date the 13th *April*, 1771, and made between *Mary Caruthers*, widow and mother of the intestate, and the intestate, of the first part, *Thomas White*, father of the defendant, of the second part, the defendant of the third part, a trustee, (who was to be made tenant to the *præcipe* in a recovery of the fourth part, and trustees of the fifth part. The mother and the intestate, conveyed to the trustee of the third part, certain estates in the possession of the mother, for the purpose of a recovery being suffered, which was to enure to the use of the said *Mary Caruthers*, the mother, for life, and after her decease, to the intestate for life, *sans waste*, remainder to trustees to preserve contingent remainders, remainder in case the defendant should survive the intestate, to the use of the defendant, the then intended wife of the intestate (in case the marriage should take effect) for life, as part of the

1794.

CARUTHERS  
against  
CARUTHERS.

[\*501]

(1) For the doctrine and material cases upon this subject, see the Editor's note to *Durnford v. Lane*, *antea*, 1 vol. 106, 107., *Williams v. Williams*, *ibid.* 152., and *Slocomb v. Glubb*, 2 vol. 545, &c. See also 1 Fonbl. T. Eq. 75, 76., and *Simpson v. Gutteridge*, 1 Madd. 609. 613, &c.

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 CARUTHERS  
 against  
 CARUTHERS.  
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*jointure and provision agreed to be made, and secured to her upon the treaty for the said marriage and in lieu, bar, recompence, and full satisfaction of all dower or thirds at the common law, or by custom, or otherwise, which the defendant should or otherwise might have, claim, or demand, out of any of the messuages, [\*] &c. wherein the intestate was then or should at any time during the intended coverture between him and the defendant be seised of any estate of inheritance, with remainder over.*

The bill also stated, that they had lately discovered another indenture, made previous to and by way of settlement on the marriage, between the intestate and the defendant, bearing date 23d May, 1771, between *Thomas Palling* of the first part, *Edward Palling*, (one of the trustees of the other settlement) of the second part, the intestate of the third part, and the defendant of the fourth part, whereby after reciting that *Thomas Palling* had surrendered the copyhold estates therein mentioned, it was witnessed that the said surrender was to the said *Edward Palling*, in trust, to the use of the said *Thomas Palling*, till the marriage, and after the marriage, in trust, to permit the said *Thomas Palling* to hold and enjoy the same for his life, *sans waste*, remainder to the intestate for life, *sans waste*, remainder (in case the marriage should take effect, and she should survive the intestate) to defendant to take the rents for life, (in case she should so long continue a widow) remainder to the children of the marriage. The present bill therefore prayed the benefit of the former decree, and suggested that the defendant was not entitled to any right of dower or free bench, or thirds at common law, or any share of the intestate's personal estate, but was debarred of the same by the provision made for her by the indenture of the 13th of April, 1771.

The defendant by her answer admitted the deeds stated in the plaintiff's bill, but insisted that she was not bound or debarred thereby, from any title she might otherwise have to dower, free-bench, or thirds of the intestate's personal estate, for that she was an infant under the age of twenty-one years (of the age of seventeen years) at the time of her signing and executing the said deeds, and incapable of doing any legal act to her prejudice, which she insists the executing the deeds was, inasmuch as *Mary Caruthers*, the mother of the intestate is still living, and therefore, if the defendant was to be bound, she would be without any present provision out of the estate of her husband, which may never vest in the defendant's possession, as *Mary Caruthers* may survive the defendant, which the defendant insisted was not only greatly to her prejudice, but contrary to law, in regard to jointures made upon marriage, and also as the provision was expressed to be in part [\*] only of the jointure agreed to be made for her, and no further jointure ever was made for her, and she insisted that the copyhold estate contained in the deed of the 23d May, 1771, was not the estate of the intestate, but of *Thomas Palling*, and therefore could not be considered as a further jointure made for the defendant, by the intestate, and not limited to herself, but to a trustee for her, and is to continue during the defendant's life only, if she remains so long a widow; for which reasons she insisted she was not barred by the said settlement of her dower and thirds, and claimed to be entitled to her dower, free-bench, and her distributive share of the personal estate.

It appeared from the evidence, that the defendant was 17 years and 12 days old at the time of her marriage, and it was admitted that *Thomas Palling* was dead, and that the defendant had entered on the copyhold, but this was an equivocal act, as she might have entered as guardian to her son.

Mr. Graham and Mr. Stratford for the plaintiffs.

There

There are two questions in this cause; 1st, Whether this jointure is not good in equity, provided Mrs. *Caruthers* had been of full age at the time of the making of it? 2. Whether it be good, regard being had to Mrs. *Caruthers* being an infant when it was made?

As to the first question, since the stat. 27 H. 8. In all cases where jointures are made, a subsequent marriage, which at common law gave a title to dower, gives no such title. So that it does not now depend on the consent of the wife, that the jointures take away her right to dower, but that having a jointure, she never gains any title to dower, the words of the statute being, every woman married having jointure made, shall not claim or have any title to dower.

Three of the six requisites to a jointure, Lord *Coke* explains to be, that it is to be in satisfaction of whole dower, not of part of dower, that it be to take effect presently after the death of the husband, that it be for the life of the widow, or a greater estate.

[\*] Three objections will be taken on the other side, 1st; That by the first deed it is only in part of her jointure; 2dly, That it is not to take effect till after the death of an intermediate tenant for life; 3dly, That as to the second deed, it is to be continued only during life or widowhood.

As to the third objection, it is none even at law; if the wife determines the estate it is her own fault. *Vernon's case*, 4 Co. Rep. 2.

As to the first objection, the words of the statute are, for the jointure of wives, the two estates were to make the satisfaction. As to the second objection, that part of the provision is not to fall in till the death of an intermediate tenant for life, it may be good as a legal objection, but is not so in a court of equity. If it was, no woman could by any act done by way of collateral satisfaction, bar herself of her dower. I put the case thus, dower is a freehold interest, and not accruing till the marriage, being a freehold interest, a release or some act enuring to those purposes, can alone bar it, but before marriage the wife could not do any such act, for the right does not accrue, and after the marriage, she could not be compelled to levy a fine, which must be a voluntary act, but in equity, though she may not strictly bar herself of the right which accrues upon the marriage, she may when sole, so contract as to put herself in the situation as to be enjoined from enforcing that right which the law would otherwise give her.

With respect to the second question, how far the settlement is good, regard being had to Mrs. *Caruthers* being an infant at the time the settlement was made.

It will be insisted upon on the other side, that an infant cannot contract, except for necessities.

But it is an improper use of the word contract, when it is applied to a jointure.

[\*] A jointure is a competent livelihood of freehold for the wife, and is so defined by Lord *Coke* (1 Inst. 36. b.) and was so held, as reported by him in *Vernon's case*, and being made under the power given by the statute, it is fair to take it as the gift of the husband, in lieu of what the wife would have been entitled to before the statute. That it is a *provisione viri* and not *ex contractu*, is a distinction expressly taken by Lord *Mansfield*, in *Drury v. Drury*, (2) and it is a provision moreover, which being made before marriage, cannot, according to the opinion of Lord *Hale*, in the MS. note to Co. Lit. 36 b. (Mr. *Hargrave's* edition),

(2) The best report of this important case of *Drury v. Drury, &c.* is from the pen of Lord *Northington*, in Mr. *Eden's* valuable cases from His Lordship's MSS. vol. ii. pp. 39. to 76.

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be waved, "though she be within age, *ut videtur*," and so seems the statute 27 H. 8. which says, "Every woman married having jointure "made shall not claim dower."

But dropping this distinction between provision and contract, why cannot a female infant enter into a covenant relative to marriage?

It is the common *Cantilena* of the Court, that an infant can only contract for necessities, such as food, raiment, education, and such like. Is marriage a necessary of this description? No: But it is undoubted, that an infant may contract marriage, why then should she not be able to contract for the incidents to marriage? To say that she shall not contract for the incidents, is to say that she shall not marry. It is not common sense, and therefore cannot be law to say that she shall contract marriage, and shall not make such incidental contracts, however advised by guardians or otherwise, which this Court would make for her. Policy requires that infants should be bound by marriage contracts. In nine cases out of ten, women are married under age, in great families almost always. What will become of all the settlements that have been made? Every man's judgment must revolt at the proposition, that they cannot enter into binding contracts. An infant may make binding contracts, even with respect to land. So in *Cannel v. Buckle*, 2 P. Wms. 242. cited in 9 Atk. 615. In *Cray v. Willis*, 9 Viner, 249, title *Dower*, it is said, an infant having a jointure may elect when of age, unless she enters. Here the widow has entered. *Price v. Seys*, Barnard. 117, is to the same purpose. *Hervey v. Ashley*, 3 Atk. 607. shews, that an infant is bound by a marriage settlement. But the case of *Drury v. [\*] Drury* (3) †, (*Drury v. The Earl of Buckinghamshire*, 5 Bro. P. C. 570.) has decided the point.

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[8. C. 2 Eden, Ca., Lord Northington, 39., and in Dom. Proc. 60., and 5 Bro. P. C. 492. octavo edition.]

† *DRURY and DRURY*, *House of Lords* (4), May 25, 26, 1762. See Hargrave's Ca. Litt. 366. note. The reporter having been favoured with a note of what passed in the House of Lords in this case, taken by the late Mr. Forrester, has been further so, by the permission to lay it before the profession. Upon a question put to the judges, whether a jointure made before marriage upon an infant under the age of twenty-one, would bar her of dower? Four of the judges, *Wilmot*, *Bathurst*, *Adams*, and *Smythe*, were of opinion it did, against *Gould*, the Chief Baron *Parker*, and Chief Justice *Pratt*, who held it would not. Lord *Hardwicke* declared himself clearly of opinion with the four, relying much on the general apprehension, ever since the making the statute of *Jointures*, and as an additional authority to 1 Inst. 37. a. upon a MS. note of Lord *Hale's* in his own hand, Co. Litt. (which he has seen,) declaring his opinion to be so, and enlarged much upon the general confusion in families, which the contrary doctrine would introduce, Dyer, 104. b. — As to the point of equity, he was also clearly of opinion that the articles were a good bar of dower in equity, and of her distributory share of her husband's personal estate. He answered the objection of its being in the husband's power to have defeated this agreement, and sold or given away his whole estate by Lord *Lechmere's* and other cases where the agreement rested, as here, on the husband's covenant; and further by observing that such an alienation would have been an eviction of the fund, out of which the jointure was to arise, and consequently let the wife into her dower, and nobody would have dealt with Sir *Thomas Drury*, without desiring to see his marriage articles, whereby the covenant would appear, and enquiring whether it was or was not performed. Another objection that Sir *Thomas Drury* had not bound himself to do any act, but only that his heirs, executors, and administrators should pay, he answered, by saying that upon the former clause, stipulating that if she survived, she should have an annuity, &c. Lady *Drury* might the day after the marriage, have brought a bill by her prochain ami, and compelled Sir *Thomas Drury* himself to settle the annuity. He was no less clear that the articles had barred her of all demand out of the personal estate, under the statute of *Distributions*, citing *Love's* case, 1 Ver. 6., and *D'Avila v. D'Avila*, 2 Ver. 724., which had been followed by innumerable determinations, which made it so trite a point, that none would now take notes of such cases, adding, that if such cases were to be rescinded

(3) See note (2) preceding page.

(4) See the best reports of it as in Dom. Proc., from Lord *Northington's* MSS., in the 2d vol. of Mr. Eden's Ca. 60., and in 5 Bro. P. C. 492. octavo edition.

[\*] Mr. Lloyd and Mr. Agar for the defendants.

How far it is proper to bind infants by marriage contracts depends on the common law, not upon arguments of prudence or policy, and the law of the land has decided that the contracts of infants, except for necessities, are void.

An infant cannot settle an account even for necessities; a suit upon a settled account, will not lie against him.

It is argued, that if infants can contract marriage, they can make other contracts relative to it; that may be so in the civil law, but is not so in ours.

There was no such idea entertained at the time of the statute 27 H. 8.

A male infant cannot enter into such a contract. *Durnford v. Lane*, (ante, vol. i. p. 106.) *Slocumb v. Glubb*, (ante, vol. ii. p. 545.) in which latter case Mr. Mansfield stated, that there was not even a dictum to that effect, as to a male infant.

In all cases of contract by an infant, he may avoid them when of age—even when he takes a vested estate—if a surrender is made to an infant, he may avoid it when of age.

[\*] As to *Cannel v. Buckle*, Lord Thurlow said at the time of arguing *Durnford v. Lane*, that he thought there was some mistake, and Lord Northampton said the same of *Harvey v. Ashley*, and particularly with

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scinded in equity, on account of the wife's infancy, it would be a manifest fraud on the husband, who thought himself thereby to have acquired all his wife's right to his personal estate, and might upon that account neglect to make a will, but leave the law to distribute his personal estate, either among his children or other next of kin. Upon the former point, he answered an objection that the Court of Chancery, though it had in numberless instances directed jointures to be made on infants, yet did no more in that case than the father or guardian, leaving the infant at liberty to waive such jointure, by saying, that if that was the case, every Chancellor who had done so, had been guilty of a most gross abuse, for which they had all deserved to be impeached, since it was no less than wilfully deceiving all these several families.

Lord Mansfield declared himself very fully and clearly of the same opinion. He (as Lord Hardwicke had done before) said that a jointure was not a contract for a provision, but a provision made by the husband, &c. as defined by Lord Coke, and so the consequences drawn from an infant's incapacity of contracting is ill founded. He denied that either by the law of England, or any other law, every contract made by an infant was void, citing the words of the edictum perpetuum de min. tit. 4 quod cum minore gestum esse dicitur, uti quaque res erit, animadvertas, that contracts for necessities, such as diet, education, &c. were good; and the infant's body is liable to be taken in execution for them; so of a sum advanced for taking an infant out of gaol. That infancy could never authorise the committing a fraud, as if goods were delivered to an infant, and he embezzled them, an action of trover would lie against him: as if he took an estate and was to pay rent for it, he should not defend himself against payment of the rent, and yet hold the estate upon pretence of his infancy; and relied on a case of *Watts v. Hailswell* and *Treswally*, where the infant issue in tail, being eighteen years old, had engrossed the mortgaged deed, and did not discover his right to the mortgagee, Lord Cowper held him bound, because being of years of discretion, he had acted dishonestly in not discovering his title, and expressed his assent to the rule that had been laid down of infants deserving this protection, from those they contracted with (i. e.) from the nature of the contract, if fair, or otherwise. He added that were infants not bound (as Lord Hardwicke had observed) by such agreements as this, no Lady could marry under age, without her father or some near friend being security that she should (when of full age) join in a fine to bar her dower, which if she should afterwards refuse to do, the husband must have his remedy for a collateral satisfaction against the heir of her father or such near friend, which would make wild work; and approved the distinction taken by Justice Wilmot, between the cases where infants contract for conveying away something of their own, and where, to bar themselves of a right of what is in a third person.

The whole therefore of the decree (except what directed an account) was reversed, and Lady Drury decreed to be barred of her dower, and thirds of the personal estate, and a competent part of the personal estate ordered to be set aside for answering her annuity of 600*l.* to be paid to her half-yearly, the residue to be divided between the two daughters, and such part also as should be so set aside after Lady Drury's death.



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respect to Lord *Hale's* opinion, he said he did not think himself bound by it.

The cases bear no analogy to the present, *Price v. Seys* only says she might be bound by an adequate settlement, *Durnford v. Lane*, is still open to an application from Mrs. *Lane*; *Clough v. Clough* (stated by Mr. Wooddeson, 3 vol. p. 453. n.) decided, that the estate was not bound; That is an answer to all the *dicta* in *Durnford v. Lane*, so that there is no case but *Drury v. Drury*.

As to the case before the court, it must be taken for granted, that Mrs. *Caruthers* has done no act to confirm the jointures.

It is impossible to support this as a jointure within the act of parliament.

Then what equity is there to bring it into this court?

It was either a good jointure at the making, or it never could become so. *Charles v. Andrews*, 9 Mod. 152.

There is no doubt but that at law this would be bad. Before the statute a jointure did not bar dower, and unless a jointure is substantially within the statute, it is not now a bar of dower. To be within the statute it must take place immediately on the death of the husband. In 3 Bacon's Abr. tit. Dower, it is stated that a settlement of an estate to the husband for life, remainder to another for life, remainder to the wife, will not bar dower, even though the intermediate remainder-man die, living the husband; here she may be out of the estate all her life. It is necessary to make it a bar, it being an estate vested in himself, not in trustees, *Vernon's* case. Then if it is not a good bar at law, what ground is there to make it a bar in equity?

Nothing subsequent to the death of the husband could vary it or make it good. The estate falling in during the widowhood, could not make it good, if it was not so before.

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[\*] Though we are not at liberty to argue that *Drury v. Drury*, is not law, yet that being the case of a competent rent charge will vary it from and prevent its application to the present case.

With respect to its being binding on the husband, and therefore upon the wife, there are many cases of contracts between adults and infants, where the adult person is bound, though the infant is not, *Forrester's* case, Siderfin, 41. *Holt v. Ward*, Fitz. 175. 275. *Zouch v. Parsons*, 3 Burrow, 1794.

This day (Feb. 18.) his Honor gave judgment to the following effect.

*Master of the Rolls.* — This is a case of great importance. — The prayer of the bill is, that the defendant, the widow, may be declared not to be entitled to any right of dower, or free-bench, or thirds of the personal estate of the intestate, her husband, but to be debarred of the same by the provision made her by the settlements, on the marriage; and the case is this,

Previous to the marriage of the intestate, with the defendant, who was an infant of the age of seventeen, a certain estate which was in the possession of his mother, was settled on the mother for life, remainder to the husband for life, remainder, if she should survive the mother and husband, to the intended wife for life, as part of the jointure and provision intended to be made and secured for her, and in lieu, bar, recompence and full satisfaction of all demands, or thirds at common law, or by custom or otherwise, of all and every the messuages, &c. as the husband might during the coverture be seized of. "No notice is taken in this settlement what was to be the other part of the jointure or provision to be made for her; but also before the marriage, *Thomas Palling* (who was the uncle of the husband, made a surrender of copyhold, which was recited to be for making some further provision for the marriage, which was to the use of himself for life, remainder to the husband

husband for life, remainder to the wife for life, if she should so long continue a widow. It does not state it to be in bar of dower, but it is impossible not to see, that it was, that further provision which was referred to in the former deed; and the question is, whether she is not bound to take these provisions in bar of dower.

[\*] The husband afterwards acquired a larger copyhold estate, in which by the custom of the manor she takes the whole for life.

It is contended that by the case of *Drury v. Drury*, or *Drury v. The Earl of Bucks* (by which name it is reported in 5 Brown's Parl. Cases,) this principle has been determined that an infant is bound at law by a jointure, and in equity will be bound by any covenant for securing a jointure, or by any collateral satisfaction, whether the same be of freehold or not: that the law has given guardians authority to bind infants by such a settlement.

To the propositions thus largely laid down, I acknowledge I must make some objection.

It is said, that great judges have laid it down, that by such a settlement made during the infancy of a female infant, her own estate would be bound, and for this *Cannel v. Buckle*, 2 Wms. 242., and *Harvey v. Ashley*, 3 Atk. 607., have been cited.

But in those cases, this was not the point decided, although something like the principle is laid down, and it appears to have been the opinion of those judges, that such was the power of guardians, and that having the power of marrying their wards, they must have that of making the collateral contracts.

But I hardly think it probable that Lord *Hardwicke* laid it down so broadly. It is impossible to apply the principle more strongly as to a female than to a male infant, and as to male infants no such doctrine has been laid down. There has been no such decision, nor was that proposition insisted on in *Drury v. Drury*.

In *Durnford v. Lane* (*ante*, vol. i. p. 106.) the principle came in question, that was a new case, the husband there was an adult, the wife was an infant. It was an attempt to bind the estate of the wife. Lord *Thurlow* had great doubts upon the subject. He held the husband bound by his own covenant, leaving the question open, how far it bound the wife.

But there is a case in which the question came directly before the Court. It is *Clough v. Clough*, in Mr. Wooddeson's Systematic View, vol. iii. p. 453. n: It was to carry into effect a settlement [\*] made before marriage of the widow, *Patty Clough*, while she was an infant. The decree declared that her estate was not bound by the marriage articles, and the bill was dismissed; that is an express decision by Lord *Thurlow*, that the contracts of male and female infants do not bind their estates, and though that is not a case of dower, it has weight in this case, and though it has not the sanction of the House of Lords, it is the opinion of a great judge.

The only question then is, whether the case of dower be an exception to the general rule.

It is said the case of *Drury v. Drury* is decisive, and that no judge ought to set up his private opinion against it.

The fair question is, what is decided by that case?

It may be said that no judge should contradict that case, but that it will only apply where exactly the same case occurs.

But I shall always hold myself bound, when I find a case so determined, not only by the case itself, but by all the principles which necessarily apply to it. I hold it a duty of a judge, where he finds a case determined by the House of Lords, to hold himself bound by all the principles which were necessary to its determination.

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What was the question there? Lord *Northington*, when the case was before him, was of opinion that a jointure at law, though accompanied with every requisite of a jointure, would not bind an infant. And 2dly, that a covenant to pay the wife an annuity of 600*l.* a-year, not out of particular lands, would not bind her: from this decree the cause went to the House of Lords. The first question on the point of law, was put to the judges; the next question was, whether an equitable jointure would bind the infant. It was held that a jointure at law would bind, and that a covenant would be held equivalent in this court, though no particular lands were specified, because it was said, it amounted to the same thing, for if there were no lands, it would be the same thing as if it was out of particular lands, and they were executed, then the wife would be entitled to her dower. So that [\*] she would have the jointure or the dower. In that case the settlement extended to settle her real estate, but there was no question or decision upon that. The House ordered a part of the personal estate to be set apart, to pay the annuity, but the widow would have had a right to have had the provision made in land, and the House of Lords would have ordered lands to be set out if she had pressed it.

All the determination therefore in that case, is that where the provision is made as effectual as if it was set out, it will be sufficient, though it is not so.

There was no question arose on that case, on the subject of election.

By the common law, upon the marriage, the wife acquires a right to dower in the freehold, and a customary share in the copyhold estates of the husband, or a provision from the husband under the statute.

It is said, that guardians have a power to bind the right of the infant, but I think *Drury v. Drury*, did not mean to decide that. If the provision had not been certain, or if she was only to take upon a remote contingency.

Before I perform an agreement I must see that it is reasonable.

Then what is a jointure, Lord *Coke* defines it "it is a competent livelihood of freehold, for the wife, to take effect immediately after the death of the husband, for the life of the wife." *Vernon's case*, 4 Rep. 2.

I wish to know what fair conclusion can be drawn from *Drury v. Drury*, that there is any equity by which a woman would be obliged to take an uncertain interest in bar of dower. Here *non constat* that one of the estates *will ever be her's in possession*; the other has fallen in if she chooses to take it.

Suppose she had had a jointure which turned out to be bad, I mean, which would not have afforded her the same advantage which she would have had from her dower, would that have bound her?

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[\*] In *Drury v. Drury*, she had as certain a provision as in her dower, therefore I think *Drury v. Drury* decides, that where the provision is equally certain with the dower, it is good.

Would she have been bound by this in her husband's life-time, whilst both the tenants for life were alive? If it is good at all, it must be so from the making of the settlement; but she could not be bound then.

Any equitable provision which a woman takes must be as certain a provision as her dower, not an uncertain provision which she may never enjoy.

I do not say, that if she had been adult, she might not have bound herself. She might have taken a provision out of the personal estate, or she might have even taken a chance, in satisfaction for her dower, acting with her eyes open, but an infant is not bound by a precarious interest.

Lord *Thurlow*, in *Durnford v. Lanc*, and in *Williams v. Williams*, held  
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that a settlement to bind an infant must be reasonable. This is not such an agreement as a Court of Equity can call upon her to confirm. The guardian is incautious where he attempts to bind the infant by a precarious provision.

Declare her not bound by the settlements, and to be at liberty to make her election, to take the provisions made for her, or to take her dower and freebench, waving the provisions; it being signified, that she consented to take the dower and freebench.

The eldest son, as he suffers by her taking her dower and freebench, must have amends made to him by the copyhold estate settled by *Palling*.

Referred it to the Master, to take an account of the value of the freehold and copyhold estates, and reserved further directions till after the account taken.

[\*] *RICH against JACKSON.*

(No Entry.)

THE bill stated, that *William Stiles*, since deceased, being possessed of certain premises in *Fleet Street*, in 1791, *William Jackson*, the defendant's late husband, entered into a treaty with him for the lease thereof, and in a conversation between them on the subject, offered him 80 guineas a year for the same, and that he *William Jackson* would pay all the taxes thereon, which *Stiles* agreed to accept.

That *Stiles* being then in a bad state of health at *Tooting*, *Jackson*, in September, in that year, went thither, and it having been mentioned by *Stiles* and *Jackson*, in the presence of witnesses, that *Stiles* was to receive 80 guineas a year, for the premises, *clear of all taxes*, *Jackson* drew up a memorandum in his own hand-writing, in which (after the usual introductory words) were the following, Mr. *William Stiles* doth agree to let and grant a lease for 21 years, to be reckoned from *Michaelmas*, 1791, of (the premises) on the aforesaid *William Jackson's* paying to the aforesaid *William Stiles* 84*l.* per annum, as follows (that is to say) 21*l.* for every quarter, and the said *William Jackson* doth agree to pay the said *William Stiles*, his heirs, executors, and administrators, the aforesaid sum of 84*l.* per annum, to be paid quarterly as aforesaid," which agreement was signed by *Stiles* and *Jackson*, and attested by *Nathaniel Seager*, who was a witness in the cause. That before any rent became due, *Jackson* wrote to *Stiles's* attorney, in order that a proper lease might be prepared of the premises, but the same was omitted to be done, and upon the 21st of November following, and before any lease was prepared, *Stiles* died, having made his will, whereby he gave the premises (*int. al.*) to Mr. *Thomas Whitehead*, who in February, 1792, agreed with the plaintiff for the purchase thereof, and the same were properly conveyed to the plaintiff.

(1) See *Lord Irnham v. Child*, ante, 1 vol. 92., *Lord Portmore v. Morris*, 2 vol. 219., *Hare v. Shearwood*, 3 vol. 168., *Jordan v. Sawkins*, *ibid.* 388. to 390., and the Editor's notes to each case. It is clearly established that although a defendant may resist the performance of an agreement upon a parol variation in a written contract (*Woollam v. Hearn*, 7 Ves. 211.), and may even have a decree for a specific execution of the articles thus varied (*Fife v. Clayton*, 13 Ves. 546., and *Gwynne v. Lethbridge*, 14 Ves. 585, &c.), a plaintiff cannot have a decree for the performance of the agreement thus varied. *Woollam v. Hearn* (*ubi supra*), &c. Parol evidence is, therefore, admissible to explain the subject matter of an agreement, but not to vary its terms. See the preceding references, *passim*, and *Ogilvie v. Foljambe*, 3 Madd. Rep. 53, &c., 63. *et seq.*, with the cases there referred to.

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[Vide the judgment in this case fully, 6 Ves. 334. note.]

*Lincoln's Inn Hall*, 24th & 26th Feb.

Parol evidence not admissible [in support of a bill for specific performance] to prove from conversations before and at the time of signing an agreement for a lease, that the intent of the parties was apparent from the memorandum, though the same was written by the lessee, and the words "clear of all taxes" (which was the purport of the conversation) were omitted in the memorandum. (1)

That

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[ \*515 ]

That the plaintiff was at the time of the conveyance to him acquainted with the verbal and written agreement between *Stiles* and *Jackson*.

That *Whitehead* having given notice to *Jackson*, that the future rents would be payable to the plaintiffs; he obtained from [\*] *Jackson*, a copy of the written agreement, from whence the plaintiff's attorney prepared a lease, containing the usual covenants, with a reservation of rent, at 84*l.* a-year, clear of all taxes whatever, which was sent to *Jackson*.

It appeared by the answer, that *Jackson* refused this lease, and caused a lease to be drawn on the terms of paying 84*l.* per annum without the words clear of taxes, which was also refused by the plaintiffs.

It was stated in the bill, and admitted by the answer, that about the 29th May, *Jackson* died intestate, and that the defendants had administered to him.

The plaintiff stated by his bill, but it was neither admitted nor denied by the answer, that the plaintiff had tendered to the defendant the lease, with the reservation of a clear rent, which she had refused, on which account the bill prayed a specific performance of the verbal agreement, and that a lease might be prepared and executed, reserving a rent of 84*l.* clear of all taxes, and an injunction to restrain the under mentioned articles.

The defendant by her answer said, she was not present at any of the conversations, but that she had frequently heard *William Jackson* in his life-time say, that it never was understood that he should pay the land-tax, that it was not an hasty transaction, but that the agreement was left with *Stiles* for a day or two for his perusal, and that he had returned it with a note, with an immaterial addition, which was made to it. And that she did not believe that *Stiles* would have raised such dispute had *Jackson* survived.

The answer then stated (which had also been mentioned in the bill) that the defendant having paid 16*l.* 8*d.* for land-tax, brought an action in the Court of Common Pleas for the recovery thereof, the plaintiff having refused to deduct the same in the payment of the rent; and the cause being tried at *Guildhall*, before the present Lord Chancellor, then Lord Chief Justice of the Common Pleas, the defendant offered parol evidence in his defence, in contradiction to the written agreement, but his Lordship was pleased to reject such evidence, and directed a verdict to be given for the defendant (then plaintiff) for 16*l.* 8*d.* [\*] with costs, with liberty to the plaintiff (defendant at law) to move the Court to impeach the same, if he should be so advised, and that upon an application of the plaintiff to the Court of Common Pleas, the Court approved the verdict, and refused a rule to shew cause why the same should not be set aside.

The common injunction had been granted in this cause, and upon a motion to discharge the same, Lord Chancellor refused so to do, and said he would permit the cause to go on to another hearing.

And the cause now coming on to be heard,

Mr. *Mansfield* and Mr. *Abbot* for the plaintiff, contended that the plaintiffs had a right to be relieved, upon proving the parol agreement, unless there was any rule in this court to prevent the reading parol evidence, to shew what was the intention of the parties (the evidence was read by way of stating it, and the verbal agreement proved from the conversations before, and at the time of executing the written agreement, was stated in the plaintiff's bill.) They then insisted that the parol evidence was admissible in this case, on the ground either of mistake or fraud. That Lord *Hardwicke*, in the case of *Joyne v. Statham*, 3 Atk. 388., had admitted parol evidence to connect an agreement upon this very subject.—That was a case in point, except as

to the state of the parties, which was the reverse. But that the distinction which prevailed with respect to the party being plaintiff or defendant had been over-ruled. If in an agreement for the purchase of an estate, there was an omission, the court will admit evidence to add to, alter, or even to contradict a written agreement of it, if it be to make it conformable to the intent of the parties. In *Filmer v. Gott*, 7 Brown's P. Ca. 70. It was admitted as to the consideration of a deed. That case is stated at large, and confirmed in *The King v. Scammonden*, 3 Term. Rep. 474. Lord *Thurlow* in *Lord Irnham v. Child*, (*ante*, vol. i. p. 92.) laid down the rule of admissibility of parol evidence to be, that where the agreement had been varied by mistake or fraud, evidence was admissible to correct it: parol evidence was read on that principle, in *Legal v. Milner*, 2 Vesey, 299, and in *Pitcairn v. Ogbourne*, 2 Vesey, 376, which was a very strong case. So in *Baker v. Payne*, 1 Vesey, 456. This case is upon an executory agreement to be executed by the Court.

[\*] Mr. *Solicitor General* and Mr. *Simeon* for the defendant, contended, that it would be dangerous to admit parol evidence, which like this, went to contradict the written agreement. The action brought in the Court of Common Pleas, was an action of money had and received, a form of action which admitted every sort of evidence which is admissible in a court of equity; yet his Lordship refused this very evidence there, and the Court of Common Pleas were of the same opinion. In all the cases cited, the evidence was to confirm the deed, not to contradict it. This was the case of *Filmer v. Gott*; it was to shew that a deed which bore on its face to be for consideration of love and affection, had also a valuable consideration; it went in support of the deed. So in *The King v. Scammonden*, it was to affirm the demand. In *Legal v. Miller*, the evidence was to shew the Court what the agreement was, not to carry it into execution. There the Court dismissed the bill: *Pitcairn v. Ogbourne*, went quite on a different ground. The decision was not at all upon this point. In *Walker v. Walker*, cited there (and reported 2 Atk. 98,) the evidence was not to contradict the written agreement. The principle is, that where there is a written agreement between parties, it shall not be permitted to contradict it by parol evidence. Here the written agreement is for a lease at a given rent, the legal consequence of that agreement is, that the land-tax would be deducted; then it is to contradict the legal effect of the agreement. In *Lord Irnham v. Child*, Lord *Thurlow* said he admitted the evidence to be read, because he thought it might bring out a new case of equity. It ought to be evident in such a case as this, that *Stiles* understood the words, that the tenant was to pay the land-tax. The evidence does not shew that; in a bill for performance of a specific agreement, the Court will not do it with a variation. Here the plaintiff is not the party at first contracting, but a person purchasing from a devisee, with notice of the contract.

Mr. *Mansfield* in reply — The statute of Frauds does not apply in this case, as the leasee's interest will be the same, and it is only that the land-tax should not be deducted, *Joynes v. Statham* is in point.

This day (February 26th) Lord *Chancellor* gave judgment to the following effect; (2)

[\*] From the evidence, believing the witnesses to speak truth, it is impossible to mistake the meaning of the parties to be exactly what Mr. *Mansfield* has stated, that the rent to be paid was meant to be a clear rent; but the parties had concluded the matter by a written

(2) There is a very full and valuable report of this judgment as communicated to Mr. Vesey, by Lord *Eldon* C., and probably taken by his Lordship, in the note to 6 Ves. 351. *et seq.* *Quod vide.*

agreement,

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agreement, which was, that a lease should be granted for twenty-one years, at a rent of 80 guineas a-year, and the tenant paying his 20 guineas a quarter, including in it his land-tax receipt. It can only be according to the sense the law puts upon it.

The party died before the payment of any rent, so that the whole matter remains upon the agreement.

The Court of Common Pleas rejected the parol evidence very properly.

I am satisfied that there is no difference in the case in equity, were the party only comes for a more formal execution of the agreement ;

I looked into all the cases : I cannot find that the Court has ever taken upon itself, to add to the form of the agreement ; that in repeated instances, the Court has refused to do so, though it has been insisted, that the parol evidence of the adverse party has shewn the written agreement to be against conscience.

*Joynes v. Statham*, (3) was a case of that sort, the parol evidence on the part of the defendant, shewed the plaintiff had taken an unfair advantage, and it was his, (defendant's) understanding that he was to receive a clear rent. Lord *Hardwicke* admitted the evidence to be read to rebut the equity. Mr. *Atkins'* note is very long, I looked at Lord *Hardwicke's* own note, which is very short. (3) He mentions *Walker v. Walker*, as cited, and very little of the argument or evidence. It then says, "Decree a specific performance on the terms of the " answer, the plaintiff submitting to this rather than to have his bill dismissed." His intention was therefore to dismiss the bill, but he gave the plaintiff this option. *Walker v. Walker* (4) proceeded exactly on the same ground where the second surrender was to be the consideration of the first. The cases cited were those in *Vernon*, where the act promised to be done on one part, raises the consideration, without which the party would not have done that which he did. The objection was taken, [\*] that it was to add to an agreement, Lord *Hardwicke* said no, it was to rebut an equity. *Legal v. Miller* is a little different in circumstances from this, but proceeds on the same ground : *Pitcairne v. Ogbourne* is not like this, the objection there ought to have been to the relevancy, not the competence, of the evidence. It was evidence of a private and fraudulent agreement, and the bill dismissed on that ground. In *Baker v. Payne*, the evidence was very properly admitted, and the agreement was corrected by original minutes, through the medium of parol evidence, of the custom of the trade. In *Filmer v. Gott*, the evidence was not to contradict the deed, but to shew the deed was obtained by fraud. *The King v. Scammonden* was properly determined. *Brodie v. St. Paul* is but slightly mentioned in the report. — These are the cases. — The hardness of the case under special circumstances may induce the Court to refuse decreeing a performance, or to leave it to the plaintiff's remedy at law, but it is quite impossible to admit the rule of law to be broke in upon, and that requires, that nothing should be added to the written agreement, unless in cases where there is a clear subsequent and independent agreement, varying the former, but not where it is of matter passing at the same time with the written agreement. The evidence offered here, which I permitted to be read, but which I ought not to have admitted, is all of matter passing at the same time with the written agreement, therefore I must dismiss the bill, but I will do so without costs.

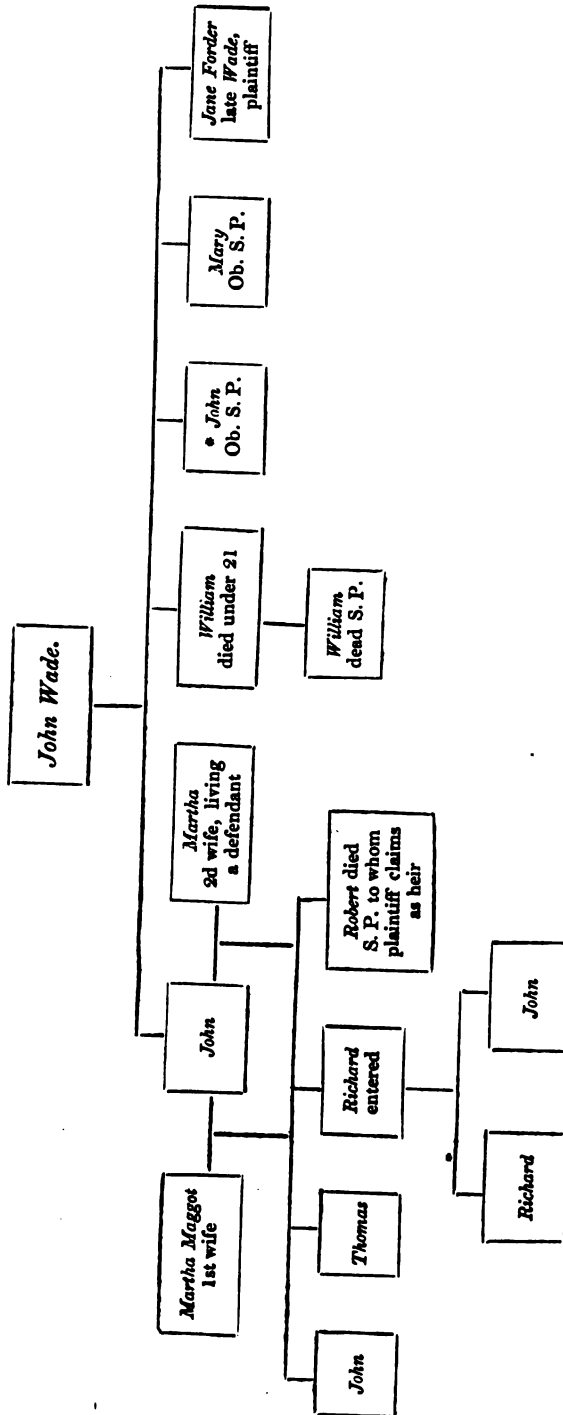
[ \*519 ]

(3) See more fully, 6 Ves. 335. note; and also per Lord *Eldon C.*, upon this case, in *M. Townshend v. Stangroom*, 6 Ves. 335, 336, 337, 338. Et vide *Woodham v. Heare*. 7 Ves. 211. et seq.

(4) Vide 6 Ves. 335. note, ut ubi supra.

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FORDER, Widow, against WADE and Others.  
PEDIGREE.



\* Query Joan? (See state of the case,) [Mr. Brown's MS. note.]



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[\*521]

Lincoln's Inn  
Hall, 5th  
March.

A widow shall not have free bench of trust estate in a copyhold. (1) — The entry of the widow as guardian to the son does not prevent his having such a seisin as to convey title to his customary heir. — In a doubtful case the account of rents and profits directed only from the time of the bill being filed. (2)

[\*] FORDER *against* WADE.

(Reg. Lib. 1793. A. fol. 369.)

THE plaintiff by her bill stated, that *John Wade* the elder, heretofore of *St. Faith com. Southton*, her late father, was at the time of his death seised in fee-simple of a copyhold estate, in the nature of Borough English, held of the manor of *Morden*, according to the custom of the said manor, to which he had been admitted the 22d of *December*, 1718, and had surrendered the same to the use of his will, by which, bearing date 26th *February*, 1735, he devised the said copyhold, with other freehold, copyhold, and leasehold estates to trustees, (who are all since dead) in trust, out of the rents and profits, and by sale of his stock in husbandry, &c. to pay an annuity to his daughter *Elizabeth*, since deceased, and also to pay 400*l.* each, to his three daughters *Joan* and *Mary*, also since deceased, and the plaintiff at twenty-one, and upon trust, when his son *William* should attain twenty-one, to raise and pay 100*l.* each, to his said three daughters, and after payment thereof, to convey all the remaining estates to his two sons *John* and *William Wade*, in fee.

The testator died without revoking or altering his will, leaving two sons and four daughters, *John* and *William Wade*, *Elizabeth*, *Clarke*, *Joan Wade*, *Mary Wade*, and the plaintiff.

*William Wade*, who with his brother *John Wade*, was entitled under the will to have the estate surrendered to them, died after the death of his father, an infant under the age of twenty-one, leaving issue one child, who also died an infant under twenty-one, and without issue, by which *John Wade* became entitled by survivorship, to have the estate conveyed to him.

*John* entered on the copyhold and other estates, and continued possessed of the same till the time of his death, but the same was not surrendered to him, nor was he ever admitted to the same notwithstanding which he surrendered his equitable interest therein, to the use of *Francis Shipman*, as a security by way of mortgage, with other estates, for the sum of 1250*l.* and interest, leaving *Martha Wade*, his widow, and *Robert Wade*, his only son by the said *Martha Wade* his second wife, an infant, his customary heir; and the said *Martha* as guardian to the said *Robert Wade*, entered into the said copyhold; and [\*] continued in possession thereof till the death of *Robert*, which happened 14th *January*, 1770, when he died an infant and without issue, leaving no brothers or sisters of the whole blood, but leaving three brothers of the half blood, *John*, *Thomas*, and *Richard*, the sons of his father, *John Wade*, by *Martha Maggot* his first wife, and leaving the plaintiff, his aunt and youngest kinswoman of the whole blood, who as such, claimed to be customary heir, by the custom of said manor, there being no uncle or the issue of an uncle of the said *Robert Wade*, living at his death, and by the custom of this manor, established by a decree of this Court, the copyholds in this manor descend in the nature of the tenure of Borough English, not only to the youngest son or youngest daughter, but also for default of brother or sister to the next youngest kinsman or kinswoman of the whole blood, of the customary tenant in possession, how far soever remote. The said *Robert Wade* having no issue, or brother or sister of

[\*522]

(1) See 1 Roper on Baron & Feme, 519. So, she is not dowable of an equity of redemption. Vide *Dixon v. Savile*, *antea*, 1 vol. 325.

(2) See *Hercy v. Ballard*, *antea*, 468, &c.

the whole blood, the plaintiff was youngest kinswoman of the whole blood to the said *Robert*, having been at the time of his death, in possession, by his mother, his guardian, by the custom.

The bill further stated, that the plaintiff being ignorant of such her right, upon the decease of the said *Robert*, *Richard Wade*, his youngest brother entered on the copyhold estate, and received the rents and profits till his death in 1787, leaving *John* his youngest son and heir, by the custom, but by his will (having surrendered the same) he devised the said copyhold estate to his wife, until his eldest son *Richard* should attain his age of twenty-one, and then to him in fee, subject to charges for his wife and daughter, and for a child of which his wife was then enceint, who was afterwards born, and christened *John*.

*Elizabeth* proved the will of the said *Richard Wade*, her husband, and entered on the copyhold estate, and claims title thereto as guardian to her son *Richard*, or her son *John*, and has since intermarried with the co-defendant *James Slade*.

The bill among other charges, charged, that the defendant *Martha*, the second wife of *John Slade*, had no title to free bench, the said *John Slade* never having been admitted, and therefore having only an equitable estate.

[\*] The bill prayed an account of rents and profits from the death of *Robert*, and that the heir of the surviving trustee in the will of the testator *John Wade*, might surrender to the plaintiff, in order that she might be admitted, and that possession of the same might be delivered to her.

The answers admitted the facts, but controverted the plaintiff's title, and the defendant *Martha* the widow admitted that upon the death of her husband she claimed her free bench, and that the steward of the manor informing her that she was not entitled to it on account of her husband being only equitably seised, she had discontinued her claim and entered as guardian to her son.

The evidence established the custom.

Mr. *Solicitor General* and Mr. *Alexander* for the plaintiff.

The only question is, whether the plaintiff as youngest aunt is heir by the custom to *Robert Wade*—That is, whether the descent is to be taken from *Robert* or *John*. *Martha* the widow of *John* entered after his decease as guardian to *Robert*, so that by her entry he was seised. They insist that her entry was in her own right as upon her free bench.

The custom of the manor is proved by a decree in the time of King *William*, to be Borough English to the youngest son or daughter, and in the same manner as to the most remote relation so that the youngest will always take in preference to the elder.

The only question then will be as to the widow's title to free bench.

They will contend on the other side, that notwithstanding the legal estate was out in trustees, the widow was entitled to free bench, and to prove this they cite *Otway v. Hudson*, 2 Vern. 583., but that case did not call for a decision of that point. The foundation of the decree there, was the obstinacy of the trustee. This is not the first time this observation has been made on that case. It was made by the Lord Chancellor in *Chaplin v. Chaplin*, 3 Wms. 229., where Lady *Chaplin* was declared not to be dowable of a trust estate. Lord *Hardwicke* determined the same [\*] point in *Godwin v. Winsmore*, 2 Atk. 526. A distinction was indeed attempted in *Banks v. Sutton*, 2 P. Wms. 700., but that was over-ruled in the *Attorney General v. Scott*, Forrester, 138., and has been confirmed in *Dixon v. Savile*, (ante, vol. i. p. 326.) where it was held there could be no title to dower, when the husband was not

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seised

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[ \*523 ]

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seised of a legal estate, and there is no distinction with respect to free bench. It may be objected that *Robert* never was admitted, but admission is not necessary to create a seisin, and convey title. The mere possession of a guardian in behalf of an infant is sufficient to transmit the title to his heir, or to the sister of the whole blood being *possessio fratris*. Moore, 125. So the possession of the mother here in behalf of the son will cause the descent to be from the son. *Vaughan v. Atkins*, 5 Burr. 2764., shews admittance is not necessary; free bench is a legal estate as well as dower: then by analogy to the cases, as to dower, it cannot be of a trust estate.

Mr. Mansfield and Mr. King for the defendant.

The question is, whether the plaintiff can claim as heir at law to *Robert*, though he left a brother of the whole BLOOD (3), that is, whether there was such a seisin in *Robert* as to transmit the title from him. — As to the question of free bench, if *John* had been entitled to a legal estate, *Martha* would have been clearly entitled to her free bench. In the cases of dower, the title of the widow does not take any thing out of the heir till the dower is assigned; but the land descends in the mean-time to the heir; but when a woman is entitled to free bench, she is entitled immediately upon the death of the husband, and it interrupts the estate of the heir: her title prevents his possession: that is the distinction between dower and free bench. — *Robert* ought to have been in, as heir, and there ought to have been no intervening estate between the ancestor and him in order to transmit the title. — *John* was undoubtedly understood to have the legal estate, otherwise he could not have surrendered to the mortgagee. But suppose his title to be merely equitable, cases have decided, that the wife of a tenant in equity has a right to free bench. The case of *Otway v. Hudson* went upon its having been so decided. In *Banks v. Sutton*, Sir Joseph Jekyll lays that down to be law. — There is such a distinction between dower and free bench, and [\*] it turns on this, that at common law a wife was not to be endowed of an use in copyholds, there is no such thing as an use, therefore the ground upon which she should not be endowed, fails. The reason would rather apply to a man, that he should not be tenant by the curtesy of the wife's trust estate, because he can get in the legal estate of his wife, which a woman *sub potestate viri* cannot of the husband's equity. — The rule as to a woman's not having dower of a trust, is a harsh rule, and ought not to be extended to copyholds. — Then if the woman was entitled to an equitable estate, in whatever character she entered, it will be the same thing to those who claim after her. Her permission of the son's taking the profits would not give him such a seisin, as to vary the descent. In *Hinton v. Hinton*, 2 Ves. 631., it was held that the husband having contracted to sell the copyhold, defeated the widow's right to free bench. If his contract can defeat her title, ought she not to have the free bench where he has an equity? Then there was no seisin in *Robert* on account of the intervening estate in *Martha*, who was prevented from entering in that character, only by the opinion of the steward. It is too late now to contend that a *possessio fratris* would not apply to this kind of property. If the Court should be of a different opinion in so doubtful a case, it will not direct the account of the rents and profits further back than the filing of the bill.

Lord Chancellor gave judgment to the following effect.

The claim made here by the plaintiff, is upon a legal right clearly established. The custom is proved specifically in favor of the half-blood. As to seisin on the death of the ancestor, entry of the heir is always congeable, it can never be tortious. The heir can never be a disseisor.

(3) See pedigree.

—The defendant could only claim as heir to *John*, excluding *Robert*, but *John* left *Robert* his heir. Then *John* was not last seised, but *Robert*, and the plaintiff is heir to *Robert*. Then to consider it as the case of a copyhold, the widow was not entitled to enter till she had paid her fine and been admitted; admission only makes her title, and in this case till admitted, *non constat* whether she would be admitted. Even a dowress, who has not entered, need not be named in a recovery. Then this is a trust estate; the case in *Vernon* is no authority. If I am right that the free bench would not exclude the heir's seisin, it would be immaterial whether the widow was [\*] entitled to free bench or not. About the time of that decision, the Courts were fluctuating upon the wife's right to dower in equitable estates. But the case in *Atkyns* shows it is now determined, that it cannot be out of a trust estate; to determine otherwise would be to raise an anomaly upon an anomaly.

Decree an account from the time of filing the bill. (4)

(4) The Court decreed the defendant *Wade*, the trustee, to procure himself to be admitted to the copyhold estate in question, and that he should then surrender the same to the plaintiff at the plaintiff's expence. He was ordered to deliver up possession of the copyhold premises to the plaintiff, and to account *ut supra*. R. L.

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against  
WADE.

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### The ATTORNEY GENERAL. *against* WILLIAMS and Others.

(Reg. Lib. 1793. A. fol. 434.)

Lincoln's Inn  
Hall, 8th  
March.

**WILLIAM DAVIS** made his will dated 8th of *August*, 1788, and thereby bequeathed 2800*l.* 3 *per cent.* reduced annuities then standing in his name, to the defendant, in trust, to permit the same to stand for ever in his name, if that could be done, otherwise to be transferred into the names of the trustees, for the use of his son for life, and of the children of his son, and if his son should die without leaving any issue, then he ordered *the dividends* and proceeds to be paid and applied *for and towards establishing a school* in the parish of *Bettews com. Cornwall*. And as to the said school, the same should be for instructing, gratis, all the poor children of said parish, and should be under the management of the ministers, churchwardens and overseers of the parish, and other persons for the time being, and gave particular instructions for the choice and removal of the master of the school.

*Thomas Davis*, the son, being dead, without leaving any issue, the Attorney General, at the relation of the minister and churchwardens of the parish, filed the present bill, praying for the application of the trust funds to the charitable purposes.

The only question was, whether this was within the statute of Mortmain.

Mr. *Solicitor General* for the defendant, insisted that under the statute of Mortmain, whatever went directly or indirectly to the purchase of lands for a charity was void. That Lord *Hardwicke*, in the case before him, might have decided otherwise, but that [\*] the succeeding chancellors, Lord *Northington*, Lord *Camden*, and Lord *Thurlow*, had leant very much the other way, and that here the dividends being to be applied toward *establishing a school*: that could not be executed without obtaining an interest in lands, and building a school-house.

The gift of  
personalty to  
establish a  
school, good,  
notwithstanding  
the stat. of  
Mortmain. (1)

[ \*527 ]

(1) See the Editor's note to *Attorney General v. Nash*, *antea*, 3 vol. 588., where this case is classed, and referred to, with others.

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ATTORNEY  
GENERAL  
against  
WILLIAMS.

But Lord *Chancellor* thought that under this disposition he could not have directed any part to be applied to the purchase of land or building, that the master might teach in his own house, or in the church, and therefore ordered a scheme to be laid before the Master, which should not include the application of any part of the dividends to the purchase or renting land. (2)

(2) His Lordship made a declaration accordingly. R. L. 435. *It seems singular, however, that the decree should prevent the trustees from renting land.*

*Lincoln's Inn  
Hall, 12th,  
13th, 14th  
March.*

In an executory trust to be effected by the Court, it is sufficient, if it can satisfy itself of the testator's intention to carry it into execution, therefore where testator gave his real estate in *A.* to a devisee in strict settlement and ordered other estates to be sold and converted into personalty, and the produce with the residue of his property, to be laid out in lands in *A.* contiguous, and convenient to his estate in *A.* and by strong expressions (though without direct words) shewed he intended it to be to the same uses, it was decreed so to be.

[ \*528 ]

### BROWNE and Another against DE LAET and Others.

(Reg. Lib. 1793. A. fol. 650. b. ; entered *Browne v. Casamajor.*)

*CHARLES DE LAET* of *Potterils com. Hertford*, Esquire, seised of real estates in the counties of *Hertford, Middlesex, Oxford*, and *York*, and elsewhere, made his last will, bearing date 18th May, 1792, duly executed and attested, and thereby gave all his manors, messuages, farms, lands, tenements, and hereditaments, as well freehold as copyhold, in the counties of *Herts* and *Middlesex*, or elsewhere, in the kingdom of *Great Britain*, unto *Justinian Casamajor*, of *Cannons com. Hertford*, Esq. for life, remainder to trustees to preserve contingent remainders, remainder to *William Charles Casamajor*, the third son of the said *Justinian Casamajor* for life, remainder to trustees to preserve, &c. remainder to his first and other sons in tail male, with several remainders over, with an ultimate remainder to the said *Justinian Casamajor* and *Humphry Sibthorp*, in fee.

And he gave and devised to the plaintiffs, and the defendant *Vernon*, his freehold and copyhold estate at *Clifton com. Oxon*, in trust, to sell for the purposes aftermentioned. So that the monies to arise from the same might become part of his personal estate, and he directed that an offer should be made of the same to *Robert Hucks*, Esq. for whose convenience he bought the same, and if he declined it, that the same should be offered to every part of his family, and if they declined it, that it should [\*] be sold for the best price that could be got for it. And as to the estate in *Yorkshire*, which then owed him nearly 30,000*l.* he had considered himself a trustee, if any benefit could arise, for *Bacon Frank*, Esq. he therefore empowered his trustees to accept from him the sum of 1600*l.* and to convey to him the said estate, and he charged the said estate with certain annuities and legacies, and after taking notice that the first taker of his *Herts* and *Middlesex* estates, would be in the possession of his mansion-house, he did therefore give to such first taker, all his plate, books, and household furniture, &c. which should be about his mansion-house at *Potterils*, and directed that such first-taker should subscribe an inventory thereof, in order that the same might be enjoyed by the said *Justinian Casamajor* (and the remainder-man) as heir-looms, with the said mansion-house. And he gave to such first-taker, all his coaches, horses, and various other things, trusting and believing that such person would permit those articles to go in as good plight and quality to the person next in succession at the time of his death, and all the rest, residue and remainder of his real and personal estate not before disposed of, except his estates so devised in the counties of *Herts* and *Middlesex*, he charged the same with a variety of pecuniary legacies, and particularly with 1000*l.* to the defendant *Vernon* to pay the costs of

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BROWNE  
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proving his will in the Commons, and other expences, but not in Chancery, but if it should be necessary to prove the said will in the Court of Chancery, then he appropriated a further sum of money, not exceeding 300*l.* for that purpose, and he charged his said residue with a further sum of 300*l.* which he gave to the defendant *Vernon*, to be laid out upon such securities as he should think fit, the interest to accumulate, that in case the account of the residue of his real and personal estate might at any time, by reason of infancy, or any other cause, be necessary to be passed through the Court of Chancery, said sum of 300*l.* and the accumulated interest thereof might defray the expence of such suit; if it should not, the *person in possession* for the time being under the limitations in his will, should defray the same, but if the account should be liquidated, and every thing settled during the life of the *first-taker*, then he gave the said 300*l.* to the said defendant *Vernon*, and after payment of the said legacies, he gave, devised and bequeathed all the money that should be left, unto the plaintiffs and the said defendant *Vernon*, in trust, that they should, as soon as conveniently might be after his decease, [\*] *with the consent and approbation of the person who, for the time being should by virtue of the limitations therein before contained, be in the actual possession of his real estates, such consent to be in writing under his hand and seal*, lay out and invest said residue in one or more purchase or purchases of freehold manors, lands, tenements, and hereditaments in the counties of *Hertford* and *Middlesex*, lying contiguous to his estates already there. And he did direct, that in laying out and investing the same in the said purchase of lands, his said trustees should invest the same in such purchases, in the said counties of *Herts* and *Middlesex*, as were near and convenient, and as contiguous as might be to those estates that were limited as aforesaid in strict settlement, and that they did not invest the same in the purchase of any mansion-house or other houses, or inns, or publick-houses, or that they purchased more than one-fifth copyhold, and that such purchase or purchases should be made with the consent of the person or persons, who for the time being should be in possession of his said several estates, by virtue of the limitations in that his will, and after taking notice that he had not made any tenant for life, without impeachment of waste, his will and meaning was, that every taker as he should come into possession, might take such timber as he should want for necessary repairs, but that proper care be taken that a succession be provided, and that the ornamental timber which he had carefully preserved and planted, might be preserved. And his will further was, that when by death or otherwise his said trustees should be reduced to one, before the whole trust-money should be laid out and invested in such purchase as aforesaid, then the surviving trustee should with the consent of the person or persons, who for the time being should be in possession of his real estates, under the limitations aforesaid, nominate and appoint one or more trustee or trustees to act with him in the premises, and should assign the several securities on which the trust money should be so invested unto such trustee or trustees; and the testator appointed the plaintiffs and the defendant *Vernon*, executors of his will.

The testator afterwards made three codicils, by the first of which, of same date with the will, he only gave an additional legacy; by the second, also bearing even date with the will, and which was attested by three witnesses, he directed that, after the death of certain annuitants, to whom he gave annuities, payable out of his real estate by the first taker, and which he charged upon [\*] every person who should come into possession of his *Herts* and *Middlesex* estates, and he recommended the first-taker, and every subsequent one, to place out 100*l.* a-year to defray the necessary expence of repairs, and to make up any deficiency in the 1000*l.* and 300*l.* given to the said defendant, *Vernon*, for costs,

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&amp;c.

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&c., and to unload so much of the residue as five or six years of such saving would do; and, by the third of such codicils, he gave a legacy to the wife of *Justinian Casamajor*, for her sole and separate use.

The testator enclosed with the said will a letter, or testamentary paper, directed for the plaintiff and defendant *Vernon*, in which he said, "the residue of my personal estate I have directed to be laid out to "encrease the little land I have in *Hertfordshire*," and further on, "my obligations to the first taker, *Justinian Casamajor*, are so many "and great, many years ago, when I wanted assistance, that gratitude "held the first call upon me, then to him and his family; the world "have no occasion to be informed what the residue of the personal "may be, so loaded as it must be, and therefore it is needless to "publish it, or to let any one know it, but those who are to see to- "wards its application properly." And the said letter contained a list of his debts, and a state of the funds he wished to be applied in payment thereof, and a list of his legacies.

The testator died 20th *June*, 1792, without revoking or altering his will, save by the codicils; and, soon after his death, the plaintiff and defendant *Vernon* proved the said will, codicils, testamentary paper, and list of legacies.

The plaintiffs and defendant *Vernon* also found a paper of calculation, by which it appeared, that the surplus of the testator's personal estate would amount to 30,000*l.* and upwards, but such paper not being of a testamentary nature, they did not prove the same.

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The plaintiffs and defendant *Vernon* entered upon the *Oxfordshire* estate, and took possession of the personal estate, and paid several of the debts, (the testator having liquidated the account with *Bacon Frank*, by dividing the copyhold estate between them, and the plaintiffs and defendant *Vernon* have contracted for the [\*] sale of that estate,) and questions arising about the disposal of the residue, the plaintiffs filed the present bill against the defendants *Vernon*, and the heir at law, and personal representative of the testator, and other necessary parties, stating the will, codicils, and testamentary paper, and the claims of the several parties; that the *Casamajors*, and others entitled to the *Herts* and *Middlesex* estates, claimed to be entitled to have the residue laid out in lands, to be settled to the same uses with the *Herts* and *Middlesex* estates; that the defendant *Peter De Laet* claimed to have the same laid out, and the land to be purchased conveyed to him as heir-at-law of the testator; and that the defendant *Mary Ann De Laet* claimed to have the estate at *Clifton* sold, and the money to arise therefrom, with the residue of the personal estate, paid to her as personal representative of the testator, and prayed that the will and codicils might be established, and the trusts thereof performed and carried into execution, under the direction of the Court, and for the proper accounts.

The defendants, by their answers, admitted the facts, and stated their respective claims as above stated.

Mr. *Hardinge* and Mr. *Abbot*, for the plaintiffs, stated the will, codicils, and testamentary papers, and the claims of the other defendants, and said their clients were mere trustees coming for the direction of the Court.

Mr. *Attorney General*, Mr. *Solicitor General*, and Mr. *Richards*, for Mr. *Casamajor* and the other defendants, who have remainders in the *Herts* and *Middlesex* estates.

There are three claimants, — the heir-at-law, the next of kin, and the *Casamajors*. It is clear the next of kin were meant to be excluded, for the testator has ordered the personal estate to be converted into real. Then, as to the heir-at-law, he must contend that it is to be laid out in land, and he must claim under the will; not as a resulting trust,  
for,

for, as there was no seisin in the ancestor, but it was personalty at the death, the resulting trust, if any, must be for the next of kin. This point decided in *Arnold v. Chapman*, 1 Ves. 108. *Dockray v. Dockray*, 1 Bro. P. C. 324. He takes as a purchaser, not as heir. But the words are inconsistent with the estate going to the heir. The intention [\*] is manifest who was to take. The testator positively uses the term "the first taker." The first taker of what? Manifestly of the *Hertfordshire* estate. It is impossible to read the will without seeing clearly what his intention was, that the estates to be here devised were to go the same way as his *Hertfordshire* and *Middlesex* estates. The case of *Ackroyd v. Smithson*, *antea*, vol. i. p. 503. shews that a construction may be raised from indirect words, where the intent is so clear that there can be no other interpretation. Here the testator clearly thought the disposition of the money might be in an infant, and has provided for it. His expression shews that he thought he had so disposed of the estate to be purchased, as to have pointed out a first-taker. All the clauses point out the same; it is impossible that he should mean the first-taker of the *Hertfordshire* estate should defray the costs of the first-taker of the estate to be purchased, unless they were the same person. The estates to be purchased are to be contiguous and convenient for the other estate; for what purpose, unless the same person was to take them? The words of the codicil are strong to the same purpose: and the paper is conclusive; the money is to be laid out to encrease the land in *Hertfordshire*; and he mentions his obligation to the *Casamajor* family. There is also an implication to be drawn from the whole, that the *Casamajors* were to take.

Mr. *Mansfield* and Mr. *Cox* for the heir-at-law. The testamentary paper, on which the principal reliance has been had, is not attested by three witnesses, and therefore can have no weight in the argument. The claim of the heir is by descent, not by implication. The intention is immaterial; the money is to be laid out in land; therefore, in a court of equity, it is land, and must descend to the heir. Then is there sufficient here to give it from the heir to the devisee? If the devisee succeeds, he must do so on a supposed intention of the testator. This is not a case of construction, as distinguished from implication. The testator has not used a single word, giving the estate to the devisee — then no implication can be raised to do so, *Gardiner v. Sheldon*, Vaughan, 259. If the devise to the *Casamajors* fail, the heir must take. Whatever real estate is to be converted into personal estate, without a sufficient object being pointed out, goes to the next of kin; so where personalty is to be converted into real, it goes to the heir-at-law, *Durour v. Motteux*, 1 Ves. 320. *Mallabar* [\*] v. *Mallabar*, For. 78. *Fletcher v. Ashburner*, *antea*, vol. i. p. 497. *Lesley v. Duke of Devonshire*, *antea*, vol. ii. p. 187.

Mr. *Lloyd* and Mr. *Stratford* for the next of kin. — Courts in these cases are bound by technical rules, therefore if I give my lands to A. a life estate only shall pass, though I intended a fee, in order to which I must use sufficient words to shew my intent. *Chapman v. Brown*, 3 Burr. 1626. Here are no words to describe the use for which the money was to be converted into land, it must therefore remain personalty and go to the next of kin. — Then as to the real estate to be sold, that must be sold, and the heir being disinherited, it must consequently go to the next of kin. *Cruse v. Barley*, 3 Wms. 20. *Attorney General v. Day*, 1 Ves. 218. There is another question as to what is to become of the intermediate estates. They must sink into the personal estate, and go with it to the next of kin. *Wyndham v. Wyndham*, *ante*, vol. iii. p. 58. We admit the testator meant to turn his personalty into real estate for the *Casamajors*, but he has not carried that intention

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into execution, by sufficient expressions to that purpose, therefore the next of kin is entitled.

Lord Chancellor this day (14th March) gave judgment to the following effect;

This bill is brought by the executors. The testator takes notice in his will of the two estates, the *Yorkshire* and the *Oxfordshire*. He proposes by his will, to make an arrangement as to these estates; as to the latter he declares himself a trustee for Mr. *Frank*; as to the second, there is a declaration of much the same kind, and makes a tender of it to Mr. *Hucks*, at a stated price. It is only in case that arrangement fails, and Mr. *Huck's* refusal to buy, that the estates are to be sold. It is not the general intent that the estates should be sold and turned into personal estate; then as to the *Hertfordshire* estate he disposes of the same to Mr. *Casamajor* for life, then through a long train of limitations, with an ultimate limitation not to the heir at law, but to *Sibthorp*. Then all the stock in hand is to be to the same uses; then he comes to dispose of the residue. The executors are to dispose of the residue in the purchase of lands in *Hertfordshire*, as conveniently situated as might be to the *Hertfordshire* estate, but not in the purchase of a mansion house, and with the consent of the [\*] successive possessors of his other estate, with many other passages in the will, to shew the intention in favour of the *Casamajors*, but I must own no direct limitation of the estate to be purchased to them.

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This is the general scope of the will. — The executors and trustees file the bill for directions from the Court how to act, and the heir at law and next of kin are made parties, and they both contend, that the trust shall not be executed at all. And they each of them contend this on grounds that shew a right in another person. The next of kin says, that the money shall not be laid out at all, but be paid to them; the heir contends it must result to him; consequently it would not be laid out at all, but result to him as money. The next of kin claims on two points, in either of which, if he succeeds, he shews a right to it as personal estate, but both of which slide from under him on examination. 1st, He says, there is a clear intention to give the residue as land to the *Casamajors*. It would follow, the next of kin could not take. 2. But that it is directed to be invested in land which C. could not take for want of precise words, giving it to him. The heir at law only has a right to make this objection. How then can the next of kin take, if the heir at law has a right? The claim of the next of kin is the worst claim that ever was set up. The heir at law contends, that the purchases must be made, and though there are various expressions about the plan and consent of the person in possession of the other estate, yet that, as there is no express disposition, he must take as heir. It is not necessary to examine how far this proposition applies to any thing that was not land in the testator, and could not descend to the heir. Mr. *Mansfield* says it must, and takes the rule as laid down in *Gardiner v. Sheldon*, I will take it in the strongest way as laid down in favour of the heir. † Lord *Vaughan* defines the rule, but you must take the context. The distinction which Lord *Vaughan* takes, where the implication is possible, and not a necessary implication, is well founded and furnishes a rule to which all judges ought to submit. It is certain that where the rule of law is clear, and the intent of the man is ambiguous, the law must prevail. Mr. *Mansfield* puts a case from *Brooke*, 13 H. 7. *Devise*, pl. 52., as a case of implication, that where a man gives an estate to his son, after the death of his wife, it gives the wife an estate for life, but that it is otherwise [\*] if he gives

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† Vide Lord *Vaughan's* observation in *Vaughan's Reports*, 262.

to a stranger after the death of the wife. But the case in *Brooke* goes on, that in either case the wife shall take *ratione intentionis*. Yet in neither case is it by necessary implication, but by a reference so plain, that no two men can doubt. It is not necessary to go further into the discussion of this point. Taking the case of *Gardiner v. Sheldon*, in the strongest view, it is very clear Lord *Vaughan's* idea does not dive into a strict necessary implication, but such an intent that nothing is left ambiguous or doubtful. If I were to apply that rule to this case in a court of law, I should find the case so free from ambiguity, that I should say, the estates to be purchased passed to the *Casamajors*. If it was a legal estate I should send it to a court of law to determine it. If I were to determine it in a court of law, I should have no doubt that the estates to be purchased were to go with *Potterils*. But the case before me is more simple. The bill is brought here for directions as to executing a trust in laying out money. In all cases where the testator has directed money to be laid out in land, it is not material whether he has used any technical term, or confounded technical terms; if there be a clear intention, the Court will execute that intention, by correcting, adding, or altering the sense. Mr. *Attorney General* mentioned the case of adding trustees to preserve contingent remainders. The only question where the Court is to be the conveyancer, is, whether the intention of the testator be against any rule of law, as to create a perpetuity; but if the intention be according to the rule of law, it will give it effect. It is sufficient to discover the intent. Then the question here is, what the intention was, and in this there is no difficulty: for the counsel for the next of kin and heir at law contended for a certain intention, almost as strongly as the *Casamajors*. That must be a certain intention of which no person can doubt. There are so many circumstances which leave no doubt that he intended the estate to be purchased for the *Casamajors*, that I need not be diffuse in repeating the observations made by every counsel who has spoke. The circumstance of directing the purchase to be made with their *consent* and *approbation*, seemed to me at first to have great force. If I look into the will, and enquire who is the person to make the *choice*, it is for the first person in possession of the other estate. It is absurd to suppose that the consent is necessary for any person but the devisees. Then it is to be as near and convenient to the other estate as possible. The legacy to *Vernon* bears irresistible evidence, that he [\*] meant to obviate too large an expence, and that he meant it as to takers in possession under the limitations in the will: nothing can more forcibly prove his intention in favour of the *Casamajors*. Then he throws the excess of the expence, if any, on the possession of the estate: it is almost as if he had said *in verbis*, persons in possession of the *Hertfordshire* estate. The codicil carries on the same idea. He recommends it as prudent to lay by out of the income enough to pay contingent expences, which shews he meant it to go in the same train of limitations. I am at present to direct, not how a real estate is to be applied, but how money is to be applied. The only matter is, to carry into execution a trust, and the Court is bound by the intent of the testator. It is unnecessary to convey that intention by any legal expressions. Trusts must always be carried into execution by the Court.

There can be no difficulty as to the interest of the money, as the Court always takes the conversion to be made at the death of the testator. The interest must therefore go as the rents of the real estate do.

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[*Vide S. C. antea*, 117. to 120.]

*Lincoln's Inn Hall*, 17th March.

Exceptions to an award over-ruled, the order being that the award should be final. (1)

DICK *against* MILLIGAN. (1)

(No Entry.)

THE plaintiffs presented a petition of re-hearing of the exceptions in this cause, (*vide ante*, p. 117.)

Upon their coming on to be reheard,  
Mr. Attorney General, for the plaintiff,

Objected to the order made by the Lords Commissioners, on the ground that the arbitrators, being by the order to take the accounts in the same manner as the master would have taken them, the parties might apply to the Court by exception, the award being in the nature of a report. Pract. Reg. 306; *Crosby v. Carrington*, 1 Vern. 469. *Hide v. Cooth*, 2 Vern. 109. It was from the whole having been referred to the arbitrators that Lord Thurlow in *Price v. Williams* (*ante*, vol. iii. p. 163.) thought exceptions would not lie, and said, the proper application would be by motion.

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[\*] The Lords Commissioners thought exceptions would lie to an award, but not such as would lie to a Master's report. They only said, that in that case the Master was the minister, but the Court the judge.

In this case, where the Court comes to apply the award to the costs, what can it do, they cannot see the right of the parties. The arbitration is defective, inasmuch as the parties have a right to see the articles of the account.

Lord Chancellor. — The Master not being an officer appointed by the parties, cannot make a final award, he can only make enquiries for the Court to proceed upon. Here the order is, that the award shall be final. It would be impossible for the arbitrators to state all the accounts. The Master's office would in that case be better; the Court might have put it, that the arbitrators should make such a report, upon which the Court might give costs, or that the costs should follow the event, but the Court made a general reservation.

Affirmed the Lords Commissioners' order.

(1) See this case, on the former hearing, *ante*, 117., with the Editor's notes.

LAND *against* DEVAYNES.

(Reg. Lib. 1793. B. fol. 413.)

*Lincoln's Inn Hall*, 28th March.

Testator gave all his plate and linen in his house in S. (with the lease) to his wife; he had but one set of plate and linen, which was usually removed with the family from house to house. The plate happened to be at B. the country house, at his death, yet it passed to the wife. (1)

SIR ROBERT BARKER, made his will, dated 22d January, 1778, and thereby (*inter al.*) reciting that under and by virtue of the settlement made and executed prior to his marriage to (the defendant) Dame Ann Barker, she would at the time of his decease, become possessed of and intitled to a very competent annual provision or income

(1) See 1 Roper on Legacies, 33, 34, 35., and, generally, that chapter on the Ademption of Specific Legacies, from p. 29. See also *Ashburner v. McGuire*, *ante*, 2 vol. 108, &c.

for

for her life, which would also be considerably augmented upon the death of her father *Brabazon Hallows*, esq., in consideration whereof, he gave to his said wife the sum of 1000*l.* only, which he directed his executors to pay into her own proper hands, immediately after his decease, and he also gave and bequeathed unto his said wife, for her own use and benefit absolutely, *all his plate, linen and furniture in his house in Savile Street, together with the lease of the said house* for the term that should be to come therein, at his decease, and all benefit and advantage to arise therefrom, and gave the residue of his estate to [\*] others of the defendants, in trust, for certain uses therein declared.

The bill was filed by infant legatees, to have the will established, and for a maintenance and proper accounts of the testator's personal estate.

The defendant, Lady *Barker*, by her answer to the bill, among other things admitted, that by consent of the executors, she had taken possession, or continued in possession of the house in *Savile Row* from the testator's decease, and had also by their assent, taken possession of the linen and furniture which were in the testator's said house at the time of his decease, and had borrowed of the executors some pieces of the testator's plate, which she was ready and willing to account for, in case the same should be deemed part of the said testator's personal estate, and not bequeathed to her by his will; That *no plate being in the house of the testator in Savile Row*, at the time of his death, the same had been claimed by his executors, although she insisted that she was not only entitled to hold and keep possession of the mansion house, and premises, and furniture, but that *she was further entitled, under his said will, to all such plate, linen and furniture as was in the said house at the time of making the said will, or such as the testator at that time had been in the habit of using in the said house from time to time during his residence there, and such as from time to time was carried backwards and forwards between the said testator's two houses at Busbridge and Savile Row, as the said testator, the defendant and their family, resided at either of the said houses.*

The cause came on to be heard 6th July, 1790, when it was referred to the Master to take an account of the testator's personal estate, and among other things, what plate, linen and furniture the said testator had in his said house in *Savile Row*, at the time of making his will, and what was become thereof.

The Master made his report, by which (*int. al.*) he found that on the 22d of January, the date of the testator's will, all the several articles of plate, linen, and furniture set forth in the schedule to his report annexed, were in the testator's house in *Savile Row*, except only sufficient linen to serve the testator's family one week without washing, which last mentioned linen was at his house at *Busbridge*.

[\*] The cause was set down for further directions, on the separate report relative to the plate.

The evidence with respect to the plate and linen was, that it had been for several years the custom of the testator and his family, to remove the plate and linen (except sufficient for one week's use without washing) from one house to the other, according as the family changed their residence, and that at the time of Sir *Robert's* decease, the whole (except a silver bowl) was at *Busbridge*.

Mr. Attorney General, Mr. Mansfield and Mr. Brown for the defendant, Lady *Barker*.

It will be contended on the other side, that the plate and linen not being at the house in *Savile Row*, at the time of Sir *Robert Barker's* death, do not pass by the will; we contend that they do, being there at the time of making the will. It is impossible to mistake the intention of the

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the testator, to give her the plate and linen usually in use in the family, and carried backwards and forwards for their convenience. — Sir *Robert* died in *September* when the plate was at the country house. It is like the case of goods in a house or shop, *Chapman v. Hart*, 1 Vesey, 271., where it was said “the removal did not imply an intention to revoke, or at least an intention in the testator, in the creation of the legacy, that if these goods were not there at the time of his death, they should not pass.” Suppose the plate had been removed from fire, or sent to the silversmith’s to be cleaned. In *Moore v. Moore*, (ante, vol. i. p. 127.) Lord *Thurlow* said, “Removal of goods for a necessary purpose, is not an ademption; what could be more necessary than the use of the family?”

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Mr. *Solicitor General* and Mr. *Lloyd* for the residuary legatees. — It is a specific bequest of plate and linen in *Savile Row*. — The Court has given that construction to similar legacies in other cases, so that if he had bought other plate that should not have passed. He clearly meant, the plate that should be in the house at his death; suppose he had given the plate in *Savile Row* to *A.* that at *Busbridge* to *B.* and afterwards had sold *Savile Row*, all would have passed to *B.* — The sending it to be cleaned, or away from fire is very different from this. In *Chapman v. Hart*, the [\*] furniture being in the shop was considered a mere circumstance. But if this case be decided for Lady *Barker*, it will not appear on what authority it stands. In one case plate sent to a silversmith’s to be cleaned, passed; but that which had been a long while at the silversmith’s, did not. The matter here was to be decided by the event, where it should be at the death, when every will of personality must speak: any alteration of a specific legacy is an ademption. *Badrick v. Stevens*, (ante, vol. iii. p. 431.) *Earl of Shaftesbury v. Countess of Shaftesbury*, 2 Vern. 747., where the gift was of goods in his house at *Ryegate*, the goods having been removed, did not pass; that was a case exactly like this. (2)

Lord *Chancellor*. — It appears that the testator not having plate and linen enough for both houses, it was his custom to remove them with himself. He had only one set of plate and linen. It is therefore like a general devise of all his plate and linen.

His Lordship therefore ordered all the plate to be delivered to Lady *Barker*, and all the linen, except the linen for the week left at *Busbridge*.

(2) The case of the Countess of *Shrewsbury* seems a more than doubtful case. See 1 Roper on Leg. 34. Besides this, taking even in consideration the reasons of the decree, as appearing in Mr. *Railhby’s* edition of *Vernon* (from R. L.), how could the testator be said to “have given the Countess some further bequest by his will, in consideration of the said goods that were removed from the house at *Ryegate*,” when the will was made before the goods were removed?

### LOVEDEN against MILFORD.

(Reg. Lib. 1793. B. fol. 259. entered *Loveden v. Phillips*.)

*Lincoln’s Inn*  
*Hall*, 29th  
*March*.

Depositions of  
witnesses de  
bene esse taken  
ex parte and without notice [of striking the names of commissioners, or of the execution of the commission], suppressed. (1)

MR. *Attorney General* supported by Mr. *Solicitor General*, and Mr. *Stanley* moved, that an order bearing date the 10th day of *February*

(1) See note (1) next page.

last,

last, whereby it was ordered "that the plaintiff be at liberty to examine *George Edwards, Henry Thomas, David Thomas and Elizabeth James*, as witnesses for them in this cause, *de bene esse*, and be at liberty to sue out a commission for that purpose" be discharged, and that the depositions taken under such commissions, may be suppressed.

The bill stated, that the plaintiff being seised of certain premises, had caused a wall to be built round them, which the defendant had caused to be pulled down, pretending that the premises were his property, and that the plaintiff's witnesses, who could prove his title, were old and infirm, and the plaintiff was likely to lose the benefit of their evidence.

[\*] The affidavits stated, that one of the witnesses was 63, and another 68 years of age.

The date of the affidavits was the 3d February, the bill was filed the 7th, the subpoena was sealed on the 8th, the order for examining the witnesses was obtained on the 10th, *ex parte*, and the commission was sealed and executed, *ex parte*, without giving defendant notice, or any opportunity of joining in the commission. On the 11th the subpoena and office copy of the bill were served at the defendant's house, when the person who left them was informed, that the defendant was not in town, and then desired the defendant's housekeeper to let his lordship know of their being left, but not to send the same to him, as they were of great consequence.

It was argued in support of the motion, that *no practice could be more dangerous than that of permitting examinations of witnesses de bene esse, without notice to the other side, as it excluded the probability of cross examination*. That the Court never permitted it to be done till after the defendant's appearance, (2) except in very special cases. — That in this case one of the witnesses was only 63 years of age, which is seven years earlier than the common practice.

Mr. Johnson for the plaintiff.

Here the plaintiff was in a situation to try his title at law, therefore after answer no harm was done, as the plaintiff must re-examine his witnesses in chief. — The examination of witnesses *de bene esse*, is so much of course that a demurrer will not lie to the bill. Mitford. Plead. 138., 1 P. Wms. 117. It is true the practice is not in general to examine witnesses under 70 years of age, but where there is a special ground, as the witnesses being infirm, you may examine earlier, and although in general it is upon notice, the loss of the evidence may be a greater inconvenience, than the examination without an opportunity to the other side to cross-examine. There have been several instances of such examinations without notice, and there is no decision that it is necessary.

Attorney General's reply. — In a case before Lord Thurlow, he made it an express condition that there should be notice.

[\*] Lord Chancellor thought the notice indispensable, and therefore discharged the order, and suppressed the depositions.

(1) This decision is on very obvious grounds of justice. Lord Eldon C. also required that notice should be given of the application to the Court even for the order to examine *de bene esse*. See *Bellamy v. Jones*, 8 Ves. 31., and the Editor's note to *Hankin v. Muddledüch*, *antea*, 2 vol. 641.

(2) The practice seems to be now settled accordingly. See *Bellamy v. Jones*, 8 Ves. 31.

1794.

LOVEDEN  
against  
MILFORD.

[ \*541 ]

[ \*542 ]

1794.

[See the whole case from commencement, stated from Reg. Lib., in 1 Madd. Rep. 376. note.

And see a full note of Lord Loughborough's judgment, 13 Ves. 479. note.]

Lincoln's Inn Hall, 31st March.

Devise of all the rest, residue and remainder of estate both real and personal (1), unto *A.* to be placed at interest, until her age of 21 years, or day of marriage, and then the whole thereof, together with the interest accumulated thereon to be paid to her, to and for her use during her natural life, and from and immediately after her decease, unto the heirs of her body lawfully begotten, equally to be divided between them, share and share alike, and in default of such issue or of the death of *A.* before her age of 21 or day of marriage, then unto her, the testatrix's brother, is an estate for life in *A.* (1)

# JACOBS & Ux. against AMYATT and Others.

(Reg. Lib. 1793. A. fol. 247. b.)

*ANN DYER* being resident in *Calcutta* in the *East Indies*, and possessed only of personal property, on the 9th of *February*, 1775, made her will, and after giving some legacies, gave all the rest, residue and remainder of her estate, both real and personal, unto Miss *Lucy Cooke* (the plaintiff,) to be placed at interest until her age of twenty-one years or day of marriage, and then the whole thereof, together with the interest accumulating thereon, to be paid to, and for her use, during her natural life, and from and immediately after her decease, she gave, devised, and bequeathed the same unto the heirs of her body lawfully begotten, equally to be divided between them, share and share alike, and in default of such issue, or of the death of said *Lucy Cooke*, before her age of twenty-one years or day of marriage, she then gave, devised, and bequeathed the said residue and remainder of her estate unto her (the testatrix's) brother.

*Lucy Cooke* attained her age of twenty-one years, and afterwards married the plaintiff, — *Jacobs*, and the only question in the cause was, whether under this will she took an estate for life, or an absolute interest in the personal property, it being admitted that the testatrix had no real estate.

This cause was heard at the Rolls, 1793, when his Honor decreed, that the plaintiff *Lucy* took only an estate for life in the property in question.

From this decree there was an appeal to the Lord Chancellor, and upon this day (31st March) His Lordship gave judgment to the following effect. (1)

The intention of the testatrix is clear; she meant the produce of the fund to be applied to the use of the natural daughter of her brother, during her infancy; she meant that nothing should vest in her, or go to

her

(1) Lord Redesdale's notes refer to *Doe dem. Davy v. Burnall*, 6 T. R. 30. There is a very full and correct report of the judgment in the principal case, in the note to 13 Ves. 479.; but it is remarkable (as there previously observed by Mr. Vesey) that Lord Loughborough, within two years afterwards, himself exploded the distinction which he relied upon in this case; by holding, in *Chandless v. Price*, 3 Ves. 99., that the same rule prevailed as to an implied estate tail as unto one that was express. See also per Lord Eldon C., 3 Meriv. 183. Lord Loughborough's reasoning, in the principal case, seems very unsatisfactory, and his Lordship's conjecture as to the case of *King v. Burckell* is not supported by the facts. See that case from Lord Northington's own notes, 1 Eden, 124. As to the testator's intention, which seems so much relied on, it is obvious that it is no more than occurs in most of the cases; but the law says such intention is against policy, and void. That the words here used, "the heirs of her body lawfully begotten," and the limitation over "in default of such issue," would raise an entail in real estate is beyond a doubt; and the Editor submits that to give effect to such limitations as to personality, in support of a testatrix's intention, is to decide against the first principles of our law. See *Britton v. Twining*, 3 Merivale, 176, &c. The doctrine in the case of *Kirkpatrick v. Kelpatrick*, 13 Ves. 477. 484, 485, and in the cases there referred to, seems inapplicable to the principal case, which appears to fall precisely within the decision of *Ellon v. Eason*, 19 Ves. 73., *Britton v. Twining*, 3 Meriv. 176., *Lyon v. Mitchell*, 1 Madd. Rep. 467., and the class of determinations on the general rule. As to this (*inter alia*) see *Glover v. Strothoff*, *antea*, 2 vol. 33., and *Attorney General v. Herd*, and *Bigge v. Bensley*, 1 vol. 170, 187, &c.

her husband, but that on her decease, it [\*] should go to her children, if she had any, if not, to her (the testatrix's) brother. The person who penned the will did not understand her intention. He has given real as well as personal estate; when she had no real estate whatsoever. He directs it to be placed out at interest (contrary to the nature of real estate) till she should attain twenty-one or marriage, then the whole to be paid to her for life, and after her decease to the heirs of her body, share and share alike. He had very little idea of the sense of the terms he made use of, and not a clear manner of expressing the testatrix's intention. The construction which gives the whole to her, must do violence to the words. It must expunge the words heirs of the body. It must expunge the words "equally to be divided," and it must expunge "share and share alike." And it must expunge these words, not to effectuate the intention, but to cross it. If I affirm the decree, I am authorised by the cases of *Doe* on the dem. of *Long v. Laming*, 2 Burr. 1100., *Wilson v. Vansittart*, in *Ambler*, 562., and by the determination on the petition in *Goodfellow v. Thompson*, by Lord Kenyon, I admit the rule in *Daw v. The Earl of Chatham*, that where personalty is so given, if the words would create a tenancy in tail in land, it is absolute: but that rule has never been extended further than where the words create a clear estate tail. (2) In the case of *Doe* on the dem. of *Blanford v. Applin*, 4 Term Rep. 82., the Court by rejecting the words, "to and amongst" took a greater latitude than in the former cases; where words in a will are rejected, it must always be to effectuate the intention of the testator. Here the words used are sufficient to prove the intent, that she should take for life only. As to *King v. Burchell*, (3) Amb. 379. I doubt the accuracy of the case, it did not require the declaration as is there stated. There *John Harris* had destroyed his own estate for life. The only thing required was, to declare the act of the tenant for life, tortious, and the recovery invalid. It would be worth while to consult the Register's book, (3) to see, whether the decree is not prefaced with some declaration to that effect. (4) I cannot say, that that case seems to me to press upon the present. The facts here are directly under the case of *Doe v. Applin*.

Decree of the Rolls affirmed.

(2) *Sed vide contra*, per Lord Loughborough himself in *Chandlee v. Price*, 3 Ves. 99., as observed in Mr. Vesey's note, 13 vol. 479., and in note (1) *antea*. See, in particular, per Lord Eldon C., in *Britton v. Twining*, 3 Merivale, 183.

(3) The Lord Chancellor explains himself more particularly in the copious note taken by Mr. Vesey (13 Ves. 481.): and Mr. Vesey seems somewhat doubtful of the accuracy of the note as to *King v. Burchell*, in 3 T.R. 296. (*Vide* 13 Ves. 482. note.) The uncertainty is, however, cleared up by Lord Northington's own valuable MS. notes of the case, in Mr. Eden's, 1 vol. p. 424.: from whence it appears that the party was held to take an estate in tail male.

(4) The entry in R. L. of it contains only a dismissal of the bill: but as to the judgment, see Lord Northington's own report of it, 1 Eden, 431, &c.

1794.

JACOBS  
against  
AMVATT.  
[\*543]



[ \*544 ] [\*] *In Chancery*,

23d of January, 1794.

## ORDER OF COURT.

(Reg. Lib. 1793. B. fol. 123.)

[*Vide etiam*  
Beames's Ord.  
Ch. 455. and  
the notes.]

General Order that on a third application for time to answer, the defendant shall submit to a Serjeant at Arms if he does not answer within the time: and also that he shall submit to the same terms on a second application for time to answer an amended bill or after exceptions allowed. (1)

**H**AVING taken into consideration the frequent and great delay of defendants in putting in their answers to bills filed against them in this court, **WE DO ORDER**, That from and after the first seal after this term, on a third application for time to answer, the defendant do consent to enter his appearance with the Register, by his clerk, in court, in four days, consenting that the Serjeant at Arms attending this Court shall go against him, as on a commission of rebellion returned *non est inventus*, in case he doth not put in his answer by the time granted.

And that on a second application for time to answer an amended bill, or after exceptions allowed, the defendant do consent to the same terms. (1)

But this is not to preclude an application to the Court under special circumstances.

And **WE DO DIRECT**, That this Order be entered with the Register, and that copies be set up in the offices belonging to this Court.

LOUGHBOROUGH, C.

Entered W. S.

R. P. ARDEN, M. R.

(1) See *Gordon v. Pitt*, *antea*, 406., and the note. The construction of this part of the order, upon several points, is settled as follows: That if a defendant has put in his answer without having come under any terms, he is, upon an amended bill, or upon exceptions allowed, entitled to one order for six weeks, in a counter cause, without coming under the above terms: this General Order not attaching until the second application. See *Portier v. De la Cour*, 8 Ves. 601. 603., and *Wells v. Powell*, 17 Ves. 113, 114. If a defendant has had three orders before his answer, and, of course, submitted that the Serj. at Arms should go, he is not entitled to the benefit of this order. *Portier v. De la Cour*, *ubi suprad.* As to the case of a peer, see *Gregor v. Lord Arundel*, 8 Ves. 87. An amended bill after a plea over-ruled, is considered as an original bill, with regard to that defendant; and he is entitled to the same orders as he would be in the case of an original bill. *Spencer v. Bryan*, 9 Ves. 231. This, of course, however, will not entitle a party to three orders, if he had one order, or more, previously to putting in his plea. For other references to this order, see Mr. Beames's valuable edition of the Ord. Ch. pp. 455, 456.

[ \*545 ] [\*] *In Chancery*.

6th Day of February, 1794.

## ORDER OF COURT.

(Reg. Lib. 1793. B. fol. 123.)

[*Vide etiam*  
Beames's Ord.  
Ch. 456. and  
the notes.]

[Party liable to full costs on allowance, beyond the *5l.*, or over-ruling a plea or demurrer, at the discretion of the Court. (1)]

**H**AVING considered that the sum of *5l.* the costs settled by rule of Court, to be paid on allowing or over-ruling a plea or demurrer,

(1) See note (1) next page.

as also the 5*l*. deposit on the re-arguing a plea or demurrer, is frequently very inadequate to the costs sustained by the parties.

We do therefore Order, that from and after THIS TERM, the parties shall, in all such cases, be liable to such further costs as this Court shall think fit to award.

And We do direct, that this Order be entered with the Register, and copies set up in the offices belonging to this court.

LOUGHBOROUGH, C.

Entered W. S.

R. P. ARDEN, M. R.

(1) See the case of *Gardiner v. Mason*, *antea*, 478, 479, which occasioned the above correction of the practice. For cases upon this order, see Mr. Beames's notes on his Ord. Ch. p. 456., and the subsequent ones of *Wood v. Dynely*, 1 Madd. Rep. 32., and *Pitkington v. Wignall*, 2 Madd. Rep. 240. and 348.

In Chancery.

30th Day of April, 1700. (1)

ORDER OF COURT.

[*Vide etiam*  
Beames's Ord.  
Ch. 458.]

**W**HEREAS by the rules and practice of this court, there is only 5*l*. deposited with the Register, by the party who appeals from a decree, or obtains a re-hearing of any cause; and only 40*s*. on re-hearing an exception to a Master's report to answer the costs of such re-hearing to the adverse party, when the decree or former order is not altered, and which is not a sufficient recompence for the great expence occasioned thereby. And that several re-hearings, both of causes and exceptions, are sought merely for delay, expecting to be admitted unto such re-hearing on depositing such money with the register as aforesaid, and they put the adverse party to great expence and obstruct justice:

[Parties liable  
to full costs,  
beyond the  
deposit, on re-  
hearings and  
appeals, at the  
discretion of  
the Court. (2)]

Wherefore, to prevent the same for the future, IT IS ORDERED, That when any party appeals from a decree, or after [\*] a hearing obtains a re-hearing of any cause, or re-hearing of any exception, the party so appealing or obtaining such re-hearing of any cause or exception, shall, for the future, upon re-hearing of any cause, deposit in the hands of the register the sum of 10*l*. and, upon the re-hearing of any exception, the sum of 5*l*. to be paid to the adverse party, when the decree or former order is not varied in some material point; and in that case, as also upon the re-hearing of any cause already granted, the party who hath appealed, or obtained any re-hearing, besides the money already deposited with the Register upon the obtaining such-rehearing, shall be also liable to pay such further costs to be taxed by one of the Masters of this Court, as this Court, upon such re-hearing, shall think fit to order and direct.

[\*546]

(1) See Beames's Ord. Chan. 458.

(2) For instances, referable to this order, see the notes in Mr. Beames's Ord. Ch. 461, 462.

*In Chancery.*

7th Day of February, 1794.

## ORDER OF COURT.

**A**FTER reciting the above Order, to the end that all parties may take notice of the said Order, IT IS ORDERED, That copies thereof be forthwith hung up in all the offices belonging to this Court.

LOUGHBOROUGH, C.

*In the matter of Bankruptcy.*

8th of March, 1794.

## LORD CHANCELLOR.

[ \*547 ]

**W**HEREAS by the act of parliament made and passed in the fifth year of the reign of his late majesty, King *George* the Second; entitled, An act to prevent the committing of frauds by bankrupts; It is enacted, " That before the creditors shall proceed to the choice of " an assignee or assignees of any bankrupt's estate, the major part in " value of the said bankrupt's creditors then present, shall, if they " think fit, direct in what manner, how, and with whom, and where " the monies arising by, and to be received from time to time, out of " the bankrupt's estate, shall be paid in and remain until the same " should be divided among all the creditors." AND WHEREAS it hath been found, that for want of such direction [\*] being given under all commissions of bankrupt, large sums of money remain in the hands of assignees, and that they delay the dividing thereof, to the great prejudice of the bankrupt's creditors: for remedy whereof, I DO HEREBY ORDER, that in every commission of bankrupt in which the major part in value of the bankrupt's creditors present at the choice of an assignee or assignees of the bankrupt's estate, shall not give the directions so specified in the said act, the assignee or assignees shall, from time to time, pay into the bank of *England* all monies which shall be got in and received from the bankrupt's estate, as often as the same shall amount to 100*l.* there to remain until the same should be divided amongst the bankrupt's creditors; and that in the assignment to be made by the commissioners to the assignee or assignees, to be chosen under every commission of bankrupt, a covenant be inserted on the part of such assignee or assignees, to pay the same conformably either to the direction of the creditors under the said act of parliament, or to this my order, as the case may be: (1) AND WHEREAS by the same act, a first dividend is directed to be made of the bankrupt's estate and effects, after the expiration of four months, and within twelve months from the time of issuing the commission, and a second dividend is, by the same act, directed to be made within eighteen months next after issuing of the commission: AND WHEREAS assignees under commissions of bankrupt, do fre-

(1) The 49 *Geo.* 3. ch. 121., called *Sir S. Romilly's Act*, gives particular directions as to the payment of the money arising from the bankrupt's estate, and imposes a penalty of 20*l.* per cent. upon the assignees in case of disobedience. *Vide* sections 3. and 4.

quently

quently neglect to comply with such the directions of the said act, to the great injury of the creditors of bankrupts. I DO THEREFORE ORDER, That in all cases where it shall appear to the commissioners, that the directions of the said act have not been complied with, they do cause due notice to be given in the *London Gazette*, and in such other of the public papers as the commissioners shall think fit, of a time and place for the assignee or assignees under such commission, to attend, to shew cause why a dividend has not been made agreeably to the directions of the said act: and if such assignee or assignees shall not then and there shew cause, to the satisfaction of the commissioners, why a dividend has not been made agreeably to the directions of the said act, I DO ORDER, that the commissioners present at such meeting, do then and there appoint the time and place when and where they will meet to make such dividend; and that they do cause due notice to be given of such meeting.

LOUGHBOROUGH, C.

[\*] *In the matter of Bankruptcy.*

8th of March, 1794.

[ \*548 ]

LORD CHANCELLOR.

WHEREAS the presenting and bringing to a hearing petitions for liberty to prove separate debts, under a joint commission of bankrupt, or for the choice of a new assignee or new assignees, upon the death or bankruptcy of an assignee or assignees; or for taking an account of the principal, interest, and costs due upon mortgage of the bankrupt's estate, and for sale of the estate for payment thereof, and to prove the deficiency as a debt under the commission, tends to create unnecessary expence and delay; I DO THEREFORE ORDER, That the commissioners in a joint commission against two or more bankrupts, shall be at liberty, at any meeting or meetings for the proof of debts under such commission, to admit the proof of any separate debt or separate debts of any one or more of such bankrupts, under such joint commission; and such separate creditors shall be at liberty to assent to, or dissent from, the allowance of the certificate of the bankrupt or bankrupts, of whom they shall be separate creditors. AND I DO FURTHER ORDER, That the commissioners do cause distinct accounts to be kept of the joint estate, and also of such separate estate or estates; and that what shall be found to belong to the separate estate or estates, shall be applied, in the first place, in or towards satisfaction of the debts of the respective separate creditors; and in case there shall be any overplus of the joint estate, after all the joint creditors shall be paid and satisfied their whole demands, that the share or shares, interest or interests of the bankrupt or bankrupts, whose separate estate or estates is or are to be applied in manner before directed in such overplus, be carried to the account of his or their separate estate or estates, and be applied in or towards satisfaction of his or their separate debts; and in case there shall be any overplus of the separate estate or estates of such bankrupt or bankrupts, after all their separate creditors shall be paid and satisfied their whole demands, that the overplus of such separate estate or estates, be carried to the account of the joint estate, and be applied in or towards satisfaction of the joint debts; and that the

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costs

[ \*549 ]

costs of taking such accounts be paid out of such separate estate [\*] or estates, and be settled by the commissioners, in case the parties differ about the same. AND I DO FURTHER ORDER, That in case an assignee or assignees of any bankrupt or bankrupts, shall become bankrupt after the date of this my order, such bankrupt, assignee or assignees, shall be removed, and shall be no longer an assignee or assignees of the estate and effects of the said bankrupt or bankrupts; and that upon the death or bankruptcy which shall from henceforth happen of any assignee or assignees, upon application made to the major part of the commissioners named in the commission, and signed by any one or more of the creditors who have or hath proved a debt or debts under the said commission, and who is or are entitled to vote in the choice of assignees, the commissioners shall cause due notice to be given in the *London Gazette*, and in such other of the public papers as they shall think fit, of the time and place when and where they shall proceed to the choice of a new assignee or assignees, in the room and stead of the said deceased, or bankrupt assignee or assignees. AND I DO ORDER, That the creditors who shall be present at such meeting, and who are entitled to vote in the choice of assignees, and any person or persons duly authorized by any such creditor or creditors not present at such meeting, do then and there proceed to such choice accordingly; and after such new assignee or assignees shall have been so chosen, I DO ORDER, That all proper parties do join in an assignment of the estate and effects of the said bankrupt or bankrupts, so as that the same may be duly vested in the new assignee or assignees, and in the surviving or solvent assignee or assignees (if any such there be). AND I DO FURTHER ORDER, That when the assignee or assignees of any bankrupt or bankrupts shall have become bankrupt, the commissioners named in the commission or commissions against such assignee or assignees, do proceed to take an account of the estate and effects of the bankrupt or bankrupts come to the hands of the assignee or assignees who shall have so become bankrupt, and of his or their assignee or assignees, or to the hands of any person or persons by their or any of their order, or for their or any of their use; in taking of which account the commissioners are to make to all parties all just allowances. AND I DO FURTHER ORDER, That such parts of the estate or effects of the bankrupt or bankrupts whose assignee or assignees shall have so become bankrupt, as shall be then remaining in specie; and also all books, papers, and writings in the custody or power

[ \*550 ]

[\*] of the said bankrupt assignee or assignees, or of his assignee or assignees relating to the said bankrupt or bankrupts, or his or their estate or effects, be delivered over to the new assignee or assignees (if any such shall have been chosen), and the solvent assignee or assignees, if any such there be, or to the solvent assignee or assignees, if no new assignee or assignees shall have been then chosen: and that such new assignee or assignees, if any such shall have been then chosen; and the solvent assignee or assignees (if any such there be), or the solvent assignee or assignees only, if such new assignee or assignees shall not have been chosen, be admitted creditors under the commission or commissions against such bankrupt assignee or assignees, for what shall be so found due from the estate or effects of such bankrupt assignee or assignees: and for the better taking the account before directed, all parties are to be examined upon interrogatories or otherwise, as the commissioners shall think fit; and are to produce upon oath, before the said commissioners, all books, papers, and writings, in their or any of their custody or power, relative to the said bankrupt or bankrupts, or his or their estate or effects, as the commissioners shall direct. AND I DO FURTHER ORDER, That, upon application to the major part of

of the commissioners named in any commission of bankruptcy, by any person or persons claiming to be a mortgagee or mortgagees (1) of any part of the bankrupt's estate or effects, the said commissioners shall proceed to enquire whether such person or persons is or are a mortgagee or mortgagees of any part of the bankrupt's estate or effects, and for what consideration, and under what circumstances; and if the commissioners shall find such person or persons is or are a mortgagee or mortgagees of any part of the bankrupt's estate or effects, and no sufficient objection shall appear to the title of such mortgagee, or to the sum claimed by him or them under such mortgage or mortgages, that the commissioners do then proceed to take an account of the principal, interest, and costs due upon such mortgage or mortgages, and of the rents and profits of the mortgaged premises received by such mortgagee or mortgagees, or by any other person or persons, by his, their, or any of their order, or for his, their, or any of their use, in case such mortgagee or mortgagees shall have been in possession of the mortgaged premises, or of any part thereof; and that the commissioners do then cause due notice to be given in the *London Gazette*, and in such other of the public [\*] papers as they shall think fit, when and where the said mortgaged premises are to be sold before them, or by public auction at any other place or places, if they shall so think fit; and that such sale be made accordingly. AND I DO FURTHER ORDER, That all proper parties do join in the conveyance or conveyances to the purchaser or purchasers, as the said commissioners shall direct. AND I DO FURTHER ORDER, That the monies to arise from such sale be applied, in the first place, in payment of the expences attending such sale, and then in payment and satisfaction of what shall be found due to such mortgagee or mortgagees, for principal, interest, and costs; and that the surplus of the said monies (if any) be paid to the assignees of the estate and effects of the said bankrupt: but in case the monies to arise from such sale shall be insufficient to pay and satisfy what shall be found due to such mortgagee or mortgagees, I do order, that such mortgagee or mortgagees be admitted a creditor or creditors under such commission for such deficiency, and to receive a dividend or dividends thereon out of the bankrupt's estate or effects, rateably and in proportion with the rest of the creditors seeking relief under the said commission, but so as not to disturb any dividend or dividends then already made: and for the better making such enquiry, and taking such account as aforesaid, and making a title to such purchaser or purchasers, I DO ORDER, That all parties be examined by the said commissioners, upon interrogatories or otherwise, as the commissioners shall think fit, and do produce before the said commissioners, upon oath, all deeds, papers, and writings in their respective custody or power, relating to the estate or effects of the said bankrupt or bankrupts, as the commissioners shall direct.

[ \*551 ]

LOUGHBOROUGH, C.

(1) *It is settled that this act does not apply to equitable mortgages. Vide Ex parte Payer*, 16 Ves. 434. The validity of an equitable mortgage is never referred to the Commissioners. When an equitable mortgage is established, a reference is made to the Commissioners to take an account of what is due upon it. See *Ex parte Jennings*, 1 Madd. Rep. 331. *et seq.*

#### ADDENDUM.

To *Bennet Coll. v. Carey, antea*, 1 vol. 390., add the following note " It appears from  
" Reg. Lib. as to the subsequent proceedings that the master reported the defendants  
" *could* make a good title. The agreement was therefore effectuated Reg. Lib.  
" 1792. A. fol. 509."

A

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### BARON AND FEME,

See POWER.

A married woman having separate property agrees with the landlord to pay an additional rent for her husband's house, in consequence of having it better fitted up. She dies and the husband files a bill for the return of the money, and to have the agreement delivered up as fraudulent on him. Bill dismissed (*Masters v. Fuller*) 19

Interest of a fund in court ordered to be paid to the wife, the husband being in a state of imbecility of mind (*Bird v. Le Fevre*) 100

A feme covert being entitled to the interest of funds for life, her husband makes a general assignment for the benefit of creditors, the assignees shall not take the dividends, without making a provision for the wife (*Pryor v. Hill*) 139

[And the wife held equally entitled, although the children were provided for *aliunde* *ibid.*]

Husband receives interest of wife's separate property, her representatives shall have no account (*Squire v. Dean*) 326

Husband's assignment of wife's property will not bar her equity (*Pope v. Crashaw*) *ibid.*

Wife's fortune was settled, but no provision made for payment of the interest during coverture. She left his house and afterwards lived in adultery: on bill filed by the husband to be paid the dividends, the Court would not decree payment without a provision for the wife, but ordered future dividends to be paid into court (*Ball v. Montgomery*) 339

In an account of dividends of the wife's separate property received by the husband, consideration should be had of his *extra* expence in her maintenance, in consequence of her being a lunatic (*Attorney General v. Parnter*) 409

### BILL.

A bill in this court cannot be maintained by a sovereign prince in *India* against the *East India* Company, for an account of monies, &c. paid in consequence of treaties, in the nature of federal conventions for the protection of their respective territories (*Nabob of Arcot v. East India Company*) 180

Will in 1754, gave a mortgage to a charity: no bill till 1792; his Honor would not dismiss it, but ordered a reference to enquire into circumstances (*Pickering v. Earl of Stamford*) 214

### BILL OF REVIEW.

Though a bill of review cannot in general be brought to reverse a decree after 20 years, that does not apply to persons having con-

tingent interests, and then not existing, or being under disabilities (*Lytton v. Lytton*) Page 441

### C.

### CHARGE.

[If a party is charged by his own examination, he may read the whole of that examination in his discharge (*Blount v. Burrow*) 72]

On estates in equal proportions, means *pro rata* on the value (*Wardell v. Wardell*) 286

Upon a lunatic's estate falling in to him as representative of his sister, shall sink for his heir at law (*Compton v. Oxenden*) 397

### CHARGE AND DISCHARGE.

[If a party be charged by his own examination, &c., he is entitled to read the whole of it in his discharge (*Blount v. Burrow*) 72]

### CHARITY.

Where an estate is given to a charity, and the rents are afterwards increased, there is no resulting trust for the heir at law, but the charity shall have the surplus rents (*Attorney General v. Haberdashers' Company*) 103

Court will not marshal assets for a charity (*Makeham v. Hooper*) 153

[Where there is a visitor, the Court will not interfere in the management of a charity, except in cases of gross abuse (*Attorney General v. Foundling Hospital*) 165]

Bill for personal estate secured by mortgage given to a charity, the will was in 1754, no bill filed till 1792, his Honor would not dismiss the bill: but ordered a reference to enquire into circumstances (*Pickering v. Earl of Stamford*) 214

Devise of real and personal estate to trustees to take a house for a school, to educate children and grandchildren of particular persons, and other children; good as to the particular objects, but bad as a general charity (*Blanford v. Fackereil*) 394

Gift of personalty to establish a school, not within the statute of Mortmain (*Attorney General v. Williams*) 526

### CHILDREN.

(Who shall take by the description of children.)

A specific sum given to the six children of A. A. had six children at the time; one more was born after the will, but before the making of the codicil, she shall not take a share with the six born before (*Sherer v. Bishop*) 55

Although where fortunes are given to children (living the father) with provision for maintenance, that shall not be raised, but accumulate, when the father is of ability to maintain them, yet when the children's fortune on a second marriage were settled to use of the mother for life, with a provision for maintenance

## A TABLE OF PRINCIPAL MATTERS.

nance out of the interest of the fund, the Court ordered an allowance (*Mundy v. Earl Howe*)  
Page 223

### CODICIL,

Duly attested, to pass real estates annexed by testator to a will, of lands, is a republication of the will, and shall pass after-purchased lands (*Barnes v. Crow*) 2  
Testator gave a residue to relations named in his will: he made a codicil which he directed to be taken as part of his will; and a second, by which he gave legacies, but gave no such direction; in this codicil there were legacies given to two of his relations: they shall take shares of the residue (*Sherer v. Bishop*) 55

### COMMISSION to examine Evidence abroad.

In order to obtain such commission, it is sufficient to state the name of the witness, that his evidence is material, and that he is abroad; not the points to which he can give evidence (*Oldham v. Carleton*) 88

### COMMISSION executed abroad.

The sending it out and receiving it back must be proved by affidavit (*Bourdillon v. Adair*) 100

### CONTEMPT.

Court refused to commit a prisoner for non-payment of the money, as a close prisoner, for a further contempt (*Call v. Mortimer*) 89  
Prisoner for contempt must be discharged on putting in answer, notwithstanding exceptions are taken to it (*Wallop v. Brown*) 212  
[But may] be detained till further answer, [after] exceptions allowed (S. C.) 223  
Defendant in court discharged on putting in answer and depositing a sum for costs, subject to taxation (*Broughton v. Martyn*) 296

### COPYHOLD,

Surrendered will pass by a deed not attested according to statute of Frauds (*Habergham v. Vincent*) 353  
The freehold in the lord will support a contingent remainder (S. C.) *ibid.*  
A widow shall not have free-bench of a trust estate in a copyhold (*Forder v. Wade*) 520

### COSTS,

#### See CONTEMPT.

A sum certain given for costs, where small (*Wilding v. Wilding*) 100  
Where a defendant has not applied for an injunction in the first instance, it shall be without costs (*Hardcastle v. Chattle*) 163  
Where an heir is brought before the Court in a charity cause, though it is determined that there is no resulting trust for him, he shall have his costs (*Attorney General v. Haberdashers' Company and Tonna*) 178

After a report that an amendment is impertinent, a motion to tax costs may be made immediately (*Muscot v. Halked*) Page 222

### CREDITOR,

#### See EQUITABLE ASSETS.

A creditor by bond cannot stand his own insurer and charge the premium to his debtor (*Hutchinson v. Wilson*) 488

### D.

### DEBT.

Though a legacy may release a debt where the security is uncanceled, it must clearly express the intent (*Wilnot v. Woodhouse*) 227

### DECREE,

#### See ACCOUNT.

### DEED,

#### See WILL.

### DEMURRER.

Where a bill seeks discovery of matter which the defendant is not obliged to answer, he must take advantage of it by demurrer (*Selby v. Selby*) 11  
Demurrer of another cause depending, over-ruled, the cause depending being such as would not be effective, and the present bill making new parties. (*Law v. Rigby*) 60  
To a bill for redemption because other defendants had been in possession 20 years, over-ruled, the fact not appearing on the face of the bill, but by averment in the demurrer (*Edsell v. Buchanan*) 254  
By the assignees to a bill filed against the executor, and heir of a certificated bankrupt allowed (*Utterson v. Mair*) 270  
Demurrer to a bill for dower over-ruled, though it stated no impediment to suing at law (*Mundy v. Mundy*) 294  
To a discovery of trading as well as of an act of bankruptcy over-ruled (*Chambers v. Thompson*) 434  
To a cross-bill to have an usurious security delivered up, not offering to pay the sum really due, allowed (*Mason v. Gardiner*) 436

### DEMURRER.

Where a bill prays discovery and relief, the plaintiff being entitled to discovery only, a general demurrer allowed (*Collis v. Swayne*) 480

### DEPOSIT,

#### See EXCEPTIONS.

### DEPOSITIONS.

[Of a foreigner to be translated into English and so returned under the commission (*Lord Belmore v. Anderson*) - - 90]

## A TABLE OF PRINCIPAL MATTERS.

Depositions *de bene esse* having been taken upon an order obtained *without notice* to the defendants, suppressed (*Loveden v. Lord Milford*) Page 540

### DEVISE,

See LIMITATION.

Of lands not in settlement upon testator's wife will pass the reversion in fee of those settled (*Glover v. Spendlove*) 337

The situation of a testator and his family taken into consideration, in questions relative to the validity of a devise (*Lytton v. Lytton*) 441

After a clear gift to a college of three presentations to a living, their interest cannot be extended by doubtful words (*Emanuel College v. Bishop of Norwich and Others*) 481

A. devised his estate in strict settlement, and orders other estates to be sold and converted into personalty, and the produce with the residue of his personalty to be laid out in lands in A. contiguous and convenient to his estate in A. and by *strong expressions* (though without *direct words*) shewed he intended it to be to the same uses, it was decreed so to be (*Brown v. De Laet*) 527

### DONATIO *mortis causâ*.

*Donatio mortis causâ* may be for a particular purpose (*Blount v. Burrow*) 72

A cheque on a banker given in the last illness, unless offered for payment during the life, not a good *donatio mortis causâ* (*Tate v. Holbert*) 286

Nor a promissory note given in the same manner (S. C.) *ibid.*

### DOWER.

Demurrer to a bill for dower over-ruled, though it stated no impediment to suing at law (*Mundy v. Mundy*) 294

A settlement made upon a female infant, by which an estate was settled on the husband's mother for life, remainder to the husband for life, remainder to the wife for life, with remainder over, in *bar of dower*, shall not bind the wife in regard the mother might (as she did) survive the husband, she may therefore elect to take the provision, or *her dower* and free-bench (*Caruthers v. Caruthers*) 500

### E.

### ELECTION.

A. by marriage settlement provides an annuity for the eldest son of the marriage: he afterwards, by will, gives to the eldest son a real estate for life, with remainders over: the eldest son must elect, between this provision and the annuity (*Blake v. Bunbury*) 21

Under a settlement the sister of a tenant in tail was entitled to an estate for life (subject to

his estate tail) taking also an interest under the brother's will, who had treated the settled estate as his own, she must elect (*Finch v. Finch*) Page 38

A settlement made upon a female infant, by which an estate was settled on the husband's mother for life, remainder to the husband for life, remainder to the wife for life, remainder over, in *bar of dower*, not binding upon the wife, in regard the mother might (as she did) survive the husband: the wife may therefore elect to take the provision, or her dower and free-bench (*Caruthers v. Caruthers*) 500

### ENTRY.

The entry of a widow, as guardian to a son, does not prevent his having such a seisin as to convey title to his customary heir (*Forder v. Wade*) 521

### EQUITABLE ASSETS.

A creditor having five bonds, one of which had been paid before bill filed, afterwards a decree that the specialty creditors should abate in proportion; he shall not be called upon to bring back what he had received, but only shall abate on the out-standing debt (*Lowthian v. Hasel*) 167

### EQUITY.

A mortgage term outstanding will bar an ejectment at law even between heir and devisee claiming subject to the charge; the only remedy therefore is in a court of equity (*Barnes v. Crow*) 2

Court of equity will not relieve against purchasers of a term from executor or administrator after length of possession, even under suspicion of fraud (*Andrew v. Wrigley*) 125

There is no equity between the heir at law of a lunatic and his personal representative (*Compton v. Oxenden*) 397

### ESTATE (*real and personal*),

See EXONERATION, EQUITY.

Contracted for, but contract dismissed on account of testator's estate made part of real estate, and the money should be laid out in land to the same uses (*Whittaker v. Whittaker*) 31

Money was by settlement to be laid out in land, to be settled to the use of husband for life, remainder to raise portions for younger children: the money was afterwards vested by order of the husband, in *South-sea annuities*; afterwards, by will he devised generally, all his manors, &c. to certain uses: the money in the funds must be laid out in land (*Hickman v. Bacon*) 333

A contract to sell will not in all cases convert the real into personalty, and it shall not be so to defeat the party's intention (*Foley v. Percival*) 419

## A TABLE OF PRINCIPAL MATTERS.

### EXAMINATION.

A party charged by his examination may read the whole of it in his discharge (*Blount v. Burrow*) Page 72

As to the examination of a foreigner, vide "FOREIGNER."

### EXCEPTIONS.

See AWARD, CONTEMPT.

Where the acceptant prevails in any of the exceptions, [it was once held he was] entitled to the deposit (*Parker v. Proust*) 1

[But it is now generally divided. Editor's note.]

Will not lie to an infant's answer (*Copeland v. Wheeler*) 256

### EXCHANGE.

As to whether a power to exchange includes a power to make partition, *quare?* *semble not.* See *Abell v. Heathcote*, 278. and Editor's note.]

### EXECUTOR OR ADMINISTRATOR.

See DEMURRER, BANKRUPT.

Where there are debts, may sell testator's term specifically devised, and even in suspicious circumstances of fraud, after long possession, by purchase, Court will not relieve (*Andrew v. Wrigley*) 125

Testator gives to defendant several benefits, in case she continues unmarried, but gives her a sum of money secured on a market *absolutely* and makes her executrix, the residue shall go to the next of kin (*Nourse v. Finch* *Hornsby v. Finch*) 239

Executrix having a life estate, residue to be divided among next of kin (*Zouch v. Lambert*) 326

### EVIDENCE.

See COMMISSION, DEPOSITIONS.

As to reading defendant's examination in evidence (*Blount v. Burrow*) 72

The examination of witnesses, being foreigners, must be in English, and the interrogatories and their answer translated by sworn interpreters (*Lord Belmore v. Anderson*) 90

*De bene esse*, see WITNESSES.

### EXONERATION.

One master of both funds charges a debt which was personal on the real estate: his heir shall not have it exonerated by the personal estate (*Hamilton v. Worley*) 199

Personal estate shall not be applied to exonerate the real, where it would defeat the intention (*Foley v. Percival*) 419

### F.

#### FATHER AND CHILD.

Father restrained from exercising paternal authority over his children, by the Court, under certain circumstances (*Warner, ex parte*) 101

### FEME COVERT.

See BARON and FEME, DOWER, ELECTION, INFANT, POWER.

Money invested in trust for a married woman, to pay her the interest for life, to her separate use, and after her decease, to such person and subject to such powers, &c. as she should by any instrument in writing from time to time, or *by will* appoint, (during her present coverture) she cannot dispose of the principal at once by deed, but by a revocable act only (*Socket and Wife v. Wray*) Page 485

### FOREIGNER.

As to examination of the depositions to be translated into English, and so returned under the commission (*Lord Belmore v. Anderson*) 90]

### H.

#### HEIR AT LAW.

Brought before court in a charity cause shall have his costs (*Attorney General v. Haberdashers' Company and Tonna*) 178

A. by will duly executed and attested, gives real estate to certain uses, and in default, to such uses as he should declare by any deed executed in the presence of *two* witnesses, he by deed poll attested by two witnesses, declares further uses: the deed poll is a testamentary act, but did not pass the freehold estate, because not executed according to the statute of frauds, but passed copyholds (*Habergham v. Vincent*) 355

There is no equity between the heir at law and personal representative of a lunatic (*Compton v. Oxenden*) 397

Where the testatrix had given real and personal estate to pay the legacies, and the personal was sufficient, the real estate shall descend to the heir (*Chitty v. Parker*) 411

### I.

#### IMPERTINENT.

See COSTS.

#### INFANT.

Exceptions will not lie to an infant's answer (*Copeland v. Wheeler*) 256

Infant persons not existing, or under disabilities having contingent interests, not barred from bringing a bill of review, though a decree has been pronounced and enrolled twenty years (*Lytton v. Lytton*) 441

Settlement upon a female infant, though said to be in bar of dower, under certain circumstances, does not bind her, and upon the death of the husband, she may elect to take the provision or her dower and free-bench (*Caruthers v. Caruthers*) 500

## A TABLE OF PRINCIPAL MATTERS.

### INJUNCTION.

- Where a bill has been filed [*and decree made*] for an account, and a creditor comes in before the master, but afterwards brings an action, the court will grant an injunction (*Hardcastle v. Chettle*) Page 165
- Injunction to restrain the Foundling Hospital from building, &c. on the grounds belonging to the hospital, refused (*Attorney General v. the Foundling Hospital*) 165
- To restrain a partner from recovering partnership funds, the defendant being in contempt (*Read v. Bowers*) 441
- To restrain an action against the auctioneer for the deposit, refused, where there had been great delay on the part of the vendor (*Lloyd v. Collett*) 470
- To restrain an action against the auctioneer for the deposit, although the estate sold was represented as freehold, with leasehold adjoining, and turned out to be almost all leasehold; and although there had been great delay in making out the plaintiff's title (*Fordyce v. Ford*) 494

### INTEREST.

- Of a contingent legacy between the death of tenant for life, and the contingency happening, falls into the residue (*Shawe v. Cunliffe*) 144
- Ordered to be calculated on sums reported due from the date of the master's report (*Cruise v. Lowth*) 157
- But this order discharged (S. C.) 316

### INTESTACY.

- Testator leaves a residue to *A.* for life, remainder to *B.* for life, then *to be divided* among his (testator's) relations; this is a mere intestacy, and goes among testator's relations at his death (*Masters v. Hooper*) 207

### JOINTENANT AND TENANT IN COMMON.

- A legacy given to two or more persons without words of severance makes a jointenancy: a remainder of two-thirds given *to and amongst* the children of *A.* and *B.*: they took as tenants in common; but the other third being *to* the children of *C.* they took as jointenants (*Campbell v. Campbell*) 15

### JURISDICTION.

See EQUITY, BILL, DEMURRER.

K.

KIN. *Next of*

See PERSONAL REPRESENTATIVES.

L.

LEASES. *Renewal of.*

- Lease for twenty-one years, at 1*l.* a-year (with covenant to renew from twenty-one years to

twenty-one years, to make up ninety-nine years) at the expiration of the first term, there being an arrear of rent due, and no application for renewal, lessor brought ejectment and got possession, bill filed for a renewal (accounting for the delay) on payment of arrears and interest decreed (*Rawestorne v. Bendley*) Page 415

### LEGACY,

See LENGTH OF TIME, CHILDREN.

- Where a legacy is contingent, the interest between death of testator for life, and the contingency happening, falls into the residue (*Shawe v. Cunliffe*) 144
- Though the gift of a legacy may release a debt, where the bond remains uncanceled, the intention must be clearly expressed (*Wilmot v. Woodhouse*) 227
- Legacies of *S. S.* annuities (though testator had more than sufficient of the stock to pay them) held pecuniary not specific (*Simmons v. Pallance*) 345
- Legacy of all the testator's plate and linen in his house in *S.* (with the lease) to his wife: he had but one set of plate and linen, which was usually removed with the family from house to house. The plate happened to be at *B.* the country house, at his death, yet it passed to the wife (*Land v. Devaynes*) 537

### LEGACY VESTED.

- Testatrix gave 1000*l.* to trustees to pay the interest to *A.* for life, then *equally* to be divided among her (testatrix's) brothers and sisters: it vested at the testatrix's death, and the representatives of those who died in the lifetime of the tenant for life shall take with the survivors (*Roebuck v. Dean*) 403
- Devise of real and personal estates to trustees to pay rents, &c. to wife for life; then to pay a legacy to the daughter; this is vested and transmissible (*Molesworth v. Molesworth*) 408

### LENGTH OF TIME,

See EQUITY, SPECIFIC PROOF.

- Raises a presumption that a legacy has been paid (*Jones v. Turberville*) 115
- Where a mortgage was given to a charity by will in 1754, no bill filed till 1792, referred to enquire into circumstances (*Pickering v. Earl of Stamford*) 214
- Where a party has lain by for a great length of time, and suffered an estate to be distributed, he shall not have an account (*Hercy v. Dinwoody*) 257

### LIEN.

- An order to pay money out of a particular fund gives the party a specific lien thereon (*Smith v. Everett*) 64

## A TABLE OF PRINCIPAL MATTERS.

A covenant to apply a certain portion of rents and profits to a particular use, gives a *specific lien* upon the estate (*Legard v. Hodges*)  
Page 421

### LIMITATION.

"After failure of issue male of the testator," under particular circumstances means, "issue by that marriage," and is not too remote (*Lytton v. Lytton*) 441  
Devise of all the rest, residue, and remainder of estate both real and personal, unto *A.* to be placed out at interest until her age of twenty-one years, or day of marriage, and then the whole thereof, together with the interest accumulated thereon, to be paid to her to and for her use, during her natural life, and from and immediately after her decease, unto the heirs of her body lawfully begotten, equally to be divided between them, share and share alike; and in default of such issue, or of the death of *A.* before twenty-one, or day of marriage, then over, an estate for life in *A.* (*Jacobs v. Amyatt*) 542

### LIMITATION. Statute of

An account of rents of an estate held of trustees ordered only for the last six years before the bill filed (*Hercy v. Ballard*) 468

### LUNATIC.

Timber being felled on a lunatic's estate by a committee by order of the court, the produce is personal estate of the lunatic (*Oxendon v. Compton*) 251  
A charge upon a lunatic's estate falling into him as reversioner of his sister, shall sink for the heir at law (*Compton v. Oxendon*) 597  
In an account against the husband's estate of dividends of the wife's separate assets received by him, consideration to be had of his *extra* expence of maintaining her, in consequence of her being a lunatic (*Attorney General v. Parnter*) 409

### M.

### MAINTENANCE.

Allowed (though the father of ability) under circumstances (*Mundy v. Earl Howe*) 225

### MARRIAGE (with Consent).

Condition gone by death of the parents (*Mercer v. Hall*) 326  
A general consent to any marriage sufficient (*S. S.*) *ibid.*

### MEMORIAL,

See ANNUITY ACT.

### MONEY IN COURT.

Court will retain money decreed to parties on the application of persons having claims upon it (*Duke of Bolton v. Williams*) Page 450

### MORTMAIN.

A bequest of money to be laid out in land for the benefit of two preachers at a chapel, is void by the statute (*Grievs v. Case*) 67  
So though to be invested *till an eligible purchase can be had* (*S. C.*) *ibid.*  
Gift of part of the fund to *A.* and *B.* the then preachers, void (*S. C.*) *ibid.*  
A general charity is void under the statute of mortmain (*Blandford v. Fackerell*) 594  
A citizen of London cannot (under the custom) give land out of London in mortmain (*Middleton v. Cater*) 409  
*A.* (before the statute of mortmain) gave real and personal estate to a use which would be within the statute, and the residue to uses not affected by it. *B.* (after the statute) gave personal estates to the *uses of A.'s will*: *A.'s* estate being sufficient for the first use, the whole of the second gift shall go to the valid use (*Attorney General v. Hartley*) 412  
The gift of *personally* to establish a school not within the statute of mortmain (*Attorney General v. Williams*) 536

### N.

NOTICE,  
See TIME.

### P.

PARENT,  
See FATHER.

### PAROL EVIDENCE.

Admission of, as to disposal of a residue, where a legacy is given to the executor (*Nourse and Hornsby v. Finch*) 239  
Admitted to shew that a conveyance which was absolute was meant only as a security, the written evidence shewing that the deed was not such as was intended (*Cripps v. Jee*) 472  
Not admissible to prove from conversations before and at the time of signing an agreement for a lease, that the intent of the parties was apparent from the memorandum, though the same was written by the lessee, and the words "clear of all taxes" (the purport of the conversation) were omitted in the memorandum (*Rich v. Jackson*) 514

### PARTITION.

[As to whether a partition be included in a power to exchange, *quere?* and see *Abell v. Heathcote*, and the Editor's notes 278]

### PARTNERSHIP.

Account directed four years after dissolution, circum-

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circumstances shewing that the partner retired from a conviction that the partnership was insolvent (*Anderson v. Maltby*) Page 423

### PERFORMANCE. (*Specific*)

See SPECIFIC PERFORMANCE.

### PERSONAL REPRESENTATIVE.

No equity between heir at law of a lunatic and his personal representatives (*Oxenden v. Oxenden*) 397

Where testatrix gave real and personal estate to pay legacies, the personal being sufficient, the real shall not be sold for the next of kin (*Chitty v. Parker*) 411

### PLATE,

See LEGACY.

### PLEA.

Inconsistent over-ruled (*Nobkissen v. Hastings*) 253

To a bill for parties to account that there was an agreement, that all matters in dispute should be referred to arbitration, over-ruled (*Michell v. Harris*) 311

That defendant's testatrix had neither constructive nor actual notice of plaintiff's title, over-ruled, not denying the fact from whence the constructive notice was to be deduced (*Jerard v. Sanders*) 322

That the person, through whom the plaintiff claims, died a batchelor and without issue, ordered to stand for an answer, with liberty to except (*King v. Holcombe*) 439

Plea to a bill of discovery and injunction, as to a specific performance of an agreement at law not to file a bill of injunction, bad, but the Court would not grant the injunction, as to the action at law (*Anth v. Sambourn*) 498

### PORITION.

A. agrees to assign land to her son, he paying a portion of 20,000*l.* to his sister: she afterwards by will, gives her sister a portion of 20,000*l.* The sister shall take but one sum of 20,000*l.* (*Finch v. Finch*) 38

### POWER. (*Execution of.*)

There being a power in the marriage settlement to husband and wife to raise a sum of money, and dispose of it by joint appointment, and a power to husband to dispose of a second legacy by his sole appointment, upon an application of the first sum, the husband covenants not to exercise his sole power during the wife's life, or whilst the legacy is unpaid, without her consent, she being dead, he disposes of the other sum (the first being undischarged) the appointment is good, the intent of the covenant being only for the wife's benefit in case of survivorship (*Uxbridge, Earl of, v. Bailey*) 13

Power to exchange includes making partition. (*Abell v. Heathcote*) Page 278

Power to a son to make a jointure, father and son covenant (on an intended marriage) to do so out of lands in *Yorkshire*. By the death of the father, lands in *Yorkshire* descend to the son, who dies without making a settlement, the lands are bound in the hands of the remainder man (*Jackson v. Jackson*) 462

Money invested in trust for a married woman, to pay her the interest for life, to her separate use, and after her decease, to such person and subject to such powers, &c. as she should by any instrument in writing from time to time, or by will appoint (during her present coverture). She cannot dispose of the principal at once, by deed, but by a revocable act only (*Socket and Wife v. Wray*) 483

### PRACTICE,

See ATTACHMENT, ACCOUNT, EXCEPTIONS, DEMURRER, COMMISSION, CONTEMPT, EVIDENCE, COSTS.

Where there is a legacy to a charity, not necessary to make the Attorney General a party. (*Chitty v. Parker*) 38

As to orders for time to put in further answer after exceptions allowed (*Gordon v. Pitt*) 406

In a cross-cause, service upon the clerk in court in the original cause good service (*Gardiner v. Thomson*) 478

Publication of the original bill stayed till answer in cross bill (*S. C.*) *ibid.*

Costs on the allowance of demurrer, (*S. C.*) and general order on production of papers admitted by the answer in defendant's custody ordered (*S. C.*) 479

### PRESUMPTION,

See LENGTH OF TIME.

### PURCHASE.

Where there is a purchase from executors and long possession, even under suspicious circumstances of fraud, Court will not relieve. (*Andrews v. Wrigley*) 125

Court would not return purchase-money for annuities not duly enrolled, out of arrears in court (*Duke of Bolton v. Williams*) 297

[A purchaser is entitled to interest on his deposit and costs at law, and in equity until the title be made good. But vendor entitled to subsequent costs, and may enforce the contract if his title be good when the report is made. The rents belong to the vendor until his title cleared (*Pincke v. Curtis*) Editor's note 333]

### R.

### RECEIVER.

General orders as to receiver's accounts 157  
A tenant

## A TABLE OF PRINCIPAL MATTERS.

A tenant in common in possession shall give security to account for a proportion of the rents to his co-tenant, or a receiver shall be appointed (*Street v. Anderton*) Page 414

### RECITAL

Of a charge for the benefit of one who is a party to the deed, omitting to recite an estate for life in remainder of the same party, shall not hurt her title (*Finch v. Finch*) 38

### RELATIONS.

Gift of a residue to A. for life, remainder to B. for life, then to be divided among his sister's relations, a mere intestacy and shall go to relations living at his death (*Masters v. Hooper*) 207

### REPUBLICATION,

See WILL, CODICIL.

### RESIDUE.

See CODICIL, EXECUTOR, LIMITATION.

Interest of a contingent legacy, between the death of tenant for life and contingency happening, falls into the residue (*Shaw v. Cundiffe*) 144

Residue to be divided by executors, on an indefinite term, vests at the death of the testator (*Stapleton v. Palmer*) 490

Residue bequeathed by a father to three natural children equally. He afterwards gives two of them (daughters) marriage portions, they shall not be held a satisfaction *pro tanto* (*Smith v. Strong and others*) 493

### REVERSION.

Devise of lands not in settlement on testator's wife, will pass the reversion in fee of the settled lands (*Glover v. Spendlove*) 337

In the sale of a reversion, part of the terms were, that the money should be paid at a given time; that not being done by the default of the vendee, the vendor was discharged his contract (*Newman v. Rogers*) 391

### S.

### SALE,

See REVERSION.

### SALE in this Court.

Bidding opened where a considerable advantage offered [on terms of paying all costs, charges, and expenses] and the estate ordered to be sold in one lot (*Watts v. Martin*) 113

After the sale and the Master's report confirmed, the bidding shall not be opened, but on [very] special circumstances; mere increase of price is not sufficient for this purpose; but that

together with the person principally interested being a prisoner for debt at the time of the sale was held sufficient (*Watson v. Birch*) Page 172  
[This case however has been much disapproved, Editor's note *Ibid.*]

### SATISFACTION,

See RESIDUE.

### STATUTE OF FRAUDS,

See WILL, HEIR.

### STATUTE OF LIMITATION.

Account of rent not directed farther back than six years (*Herry v. Ballard*) 468

### SPECIFIC PERFORMANCE.

See INJUNCTION.

Court will not decree a specific performance of an agreement to purchase, where there is a doubtful title (*Cooper v. Denne*) 80

May be decreed after considerable delay, if the vendor has not demanded his deposit or shown a determination not to proceed in the purchase (*Pink v. Curteis*) 529

But where the sale is of a reversion, the time is material, and the money not being paid by the day, by default of vendee, the vendor was discharged from his contract (*Newman v. Rogers*) 391

Cannot be decreed of an agreement with a variation made in it by the court (*Jordan v. Sawkins*) 477

### T.

### TENANT IN COMMON.

A tenant in common in possession shall give security to answer a proportion of the rent to another tenant in common, otherwise a receiver shall be appointed (*Street v. Anderton*) 414

### TIMBER.

Bill by infant, tenant in tail in reversion, to have timber cut; the timber ordered to be felled and the claims to be discussed when tenant in tale comes of age (*Mildmay v. Mildmay*) 76

### TIME.

A notice for a given hour is satisfied by an attendance before the next (*Knox v. Simmonds*) 433

### TRUST. (resulting.)

See EXECUTOR, HEIR.

Real and personal estate given to a use within the statute of Mortmain, results in proportion to the heir at law and personal representative (*Middleton v. Cater*) 409

### TRUST. (executory.)

See DEVISE 4. (*Broune v. De Laet*) 527



## A TABLE OF PRINCIPAL MATTERS.

<p style="text-align: center;"><b>TRUSTEE.</b></p> <p>Purchases a leasehold estate devised to him for the use of the plaintiff, at an appraisement, and afterwards gets a new lease in his own name; also purchases part of the testator's share, declared to be a trustee and accountable for the same to the plaintiff (<i>Killick v. Flesney</i>) <span style="float: right;">Page 160</span></p>	<p style="text-align: center;"><b>W.</b></p> <p style="text-align: center;"><b>WASTE,</b> <i>See LUNATIC.</i></p> <p style="text-align: center;"><b>WILL,</b> <i>See ACCOUNT, HEIR, LEGACY.</i></p> <p>Will of lands republished by a codicil duly executed, and after-purchased lands shall pass (<i>Barnes v. Crow</i>) <span style="float: right;">Page 2</span></p>
<p style="text-align: center;"><b>V.</b></p> <p style="text-align: center;"><b>VENTRE (<i>inspiciendo</i>.)</b></p> <p>Writ <i>de ventre inspiciendo</i> against a married woman (whose husband had been near 10 years abroad) on the application of a devisee in a will (<i>Wallop ex parte</i>) <span style="float: right;">90</span></p>	<p>A deed may operate as a will (<i>Habergham v. Vincent</i>) <span style="float: right;">353</span></p> <p>An original will ordered to be delivered out of the Ecclesiastical Court to the solicitor to be produced, he giving security to return it undefaced (<i>Forder v. Wade</i>) <span style="float: right;">476</span></p>
<p style="text-align: center;"><b>[VISITOR.]</b></p> <p>Where there is a visitor of any charity the courts of equity will not control the management, &amp;c. <i>except in cases of gross abuse, et similia</i> (<i>Attorney General v. Foundling Hospital</i>) <span style="float: right;">165]</span></p>	<p style="text-align: center;"><b>WITNESS.</b></p> <p style="text-align: center;"><i>See EVIDENCE, ACCOUNT.</i></p> <p>May be examined <i>de bene esse</i> being the only person that knew the facts, without stating the age (<i>Cholmondley, Ltd. v. Earl of Oxford</i>) <span style="float: right;">157</span></p>
<p style="text-align: center;"><b>U.</b></p> <p style="text-align: center;"><b>USURY.</b></p> <p>To constitute usury there must be a loan: therefore an agreement to purchase and pay rent till the purchase money paid, is not usury (<i>Spurrier v. Mayoss</i>) <span style="float: right;">28</span></p>	<p>In order to obtain a commission to examine a witness abroad, it is not necessary to state the points to which he is to be examined (<i>Oldham v. Carlton</i>) <span style="float: right;">88</span></p> <p style="text-align: center;"><b>WRIT, <i>de ventre inspiciendo</i>.</b></p> <p>(<i>Wallop ex parte</i>) <span style="float: right;">90</span></p>

FINIS.



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